(30,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 933

THE CITY OF NEWARK, THE CITY OF JERSEY CITY, AND THE STATE OF NEW JERSEY, APPELLANTS,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE PORT OF NEW YORK AUTHORITY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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Praecipe.

1

United States District Court

District of New Jersey

[No. 4033—In Equity.]

THE CITY OF NEWARK, *Complainant-Appellant,*
THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY, *Intervenors-Appellants,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, *Defendants-Appellees.*

2

Sirs:

PLEASE TAKE NOTICE that the appellants, the City of Newark, the City of Jersey City and the State of New Jersey, propose that the following portions of the record in the above entitled cause and proceeding be included in the transcript upon the appeal of each of them from the order and decree made and filed herein on the 23rd day of February, 1923:

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1. This Praecipe.

1a. Citation.

2. Copy of Docket Entries.

3. The Bill of Complaint herein verified the 11th day of January, 1923.

4. The affidavits of Charles W. Staniford, Henry R. Lewis, F. J. Stillwaggon, Victor Geli-

4 neau and Thomas L. Raymond, all verified the 11th day of January, 1923, and the notice of motion for injunction during the pendency of this suit, dated January 11, 1923.

5. Petition of the State of New Jersey, by Thomas F. McCran, Attorney-General, for leave to intervene, and notice of motion for an order permitting the aforesaid State of New Jersey to intervene herein.

6. Petition and Notice of Motion for an order permitting the City of Jersey City to intervene in the cause, dated January 22, 1923.

5

7. Notice of Motion of defendant, The Central Railroad Company of New Jersey, for an order dismissing the Bill of Complaint.

8. Affidavit of William Leary, secretary of The Port of New York Authority, verified January 18, 1923, with exhibits annexed dated respectively July 27, 1922, August 26, 1922, September 8, 1922, and December 21, 1922.

9. Answer of the Port of New York Authority with exhibits annexed marked respectively "E," "F" and "G."

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9a. Opinion of the Court.

10. The decree entered herein on the 23rd day of February, 1923.

Praecipe

11. Petition for appeal.
12. Order allowing appeal.
13. Assignments of error.

Dated at Newark, New Jersey, March 3, 1923.

JEROME T. CONGLETON,
Solicitor for the City of Newark,
Complainant-Appellant.

THOMAS J. BROGAN,
Solicitor for the City of Jersey City,
Intervenor-Appellant.

THOMAS F. McCRAN,
Attorney General of the State of
New Jersey, Intervenor-Appellant.

To:

GEORGE T. CRANMER, Esq., Clerk of the United States District Court, District of New Jersey, Post Office Building, Newark, New Jersey.

GEORGE HOLMES, Esq., Solicitor for the Central Railroad Company of New Jersey, 33 Terminal Building, The Central Railroad Company of New Jersey, Jersey City, New Jersey.

JULIUS HENRY COHEN, Esq., Solicitor for Defendant Appellee, The Port of New York Authority, 111 Broadway, New York City.

Citation on Appeal.

By the Honorable CHARLES F. LYNCH,

One of the Judges of the District Court of the United States, for the District of New Jersey, in the Third Circuit:

To the Central Railroad Company of New Jersey, and the Port of New York Authority, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Third Circuit to be holden in the City of Philadelphia in the Circuit above named, on the 30th day of March, 1923, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the District of New Jersey, wherein the City of Newark, the City of Jersey City and the State of New Jersey are appellants, and you are appellees, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand in the City of Newark in the District and Circuit above named, this 20th day of March, in the year of Our Lord, One thousand nine hundred and twenty-three.

CHARLES F. LYNCH,
Judge of the District Court of the United States for the District of New Jersey, in the Third Circuit.

Docket Entries.

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UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity.]

CITY OF NEWARK, STATE OF NEW JERSEY, MAYOR and ALDERMEN OF JERSEY CITY

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and PORT OF NEW YORK AUTHORITY.

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Jan. 11,	1923	Bill of complaint filed.
" "	"	Subpoena issued.
" 12,	"	Notice of motion for Injunction filed.
" "	"	Affidavits on motion for Injunction filed (5).
" 18,	"	Notice of motion of Central R. R. Co. of N. J. to dismiss bill filed.
" 20,	"	Subpoena returned, served Jan. 12, and filed.
" 18,	"	Affidavit of Jerome T. Congleton filed. 15
" "	"	Certificate filed.
" 24,	"	Petition of State of New Jersey for leave to intervene filed.
" "	"	Notice of motion for leave to intervene filed.
" "	"	Order permitting the State of New Jersey to intervene filed.
" "	"	Petition for Mayor and Aldermen of Jersey City to intervene filed.

Docket Entries

16	Jan. 24, 1923	Order permitting Mayor and Aldermen of Jersey City to intervene filed.
	" " "	Affidavit filed.
	" " "	Answer of Port of New York Authority filed.
	" " "	Hearing on motion to dismiss bill.
	Feb. 15, "	Opinion filed.
	" 23, "	Notice of application for settlement of decree filed.
	" " "	Final Decree dismissing bill as to Central Railroad Company of New Jersey with costs filed.
17	" " "	Assignment of Errors filed.
	" " "	Appeal and allowances filed.
	" 24, "	Bond on appeal filed.
	" " "	Citation issued.
	" 26, "	Citation returned, service acknowledged. Copy filed.
	" " "	Acknowledgement of Service filed.
	Mar. 8, "	*Praecipe* of record on appeal filed.
	" 10, "	*Praecipe* of record on appeal filed.

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Notice of Motion.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[No. 4033—In Equity.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,

Defendants.

To the above-named Defendants:

PLEASE TAKE NOTICE, that upon the bill of complaint herein and the annexed affidavits of Charles W. Staniford, Henry R. Lewis, F. J. Stillwaggon, Victor Gelineau and Thomas L. Raymond, all verified the 11th day of January, 1923, a motion will be made by the undersigned, at a term of this Court to be held for the hearing of motions, in the Post Office Building, in the City of Newark, New Jersey, on the 17th day of January, 1923, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order restraining the defendant, The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns during the pendency of this suit from proceeding with the construction of any bridge across the Newark Bay between the cities of Elizabeth,

22 New Jersey, and Bayonne, New Jersey; and for such other and further relief as may be just in the premises.

Dated, Newark, N. J., January 11, 1923.

Yours, etc.,

JEROME T. CONGLETON,
Solicitor for Complainant,
Office and Post Office Address,
City Hall,
Newark, New Jersey.

23

Complaint.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—No. 4033.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY
24 and THE PORT OF NEW YORK AUTHORITY,
Defendants.

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The City of Newark, by Jerome T. Congleton, its Corporation Counsel and Solicitor, complaining of The Central Railroad Company of New Jersey, and The Port of New York Authority, alleges:

Complaint

I.

Complainant is a municipal corporation existing under the laws of the State of New Jersey, having all the powers conferred upon it by the statutes of said state.

II.

The defendant, The Central Railroad Company of New Jersey, is a corporation existing under the laws of the State of New Jersey.

III.

The defendant, The Port of New York Authority, is a body corporate and politic, constituted under the laws of the States of New Jersey and New York and of the United States.

IV.

The City of Newark is the owner in fee of certain real estate and the riparian rights appurtenant thereto located in the City of Newark, in the County of Essex and State of New Jersey, on the westerly shore of Newark Bay, which is a navigable tidal body of water lying wholly within the State of New Jersey, the said real estate being more specifically described as follows:

Extending from the pierhead line along the west shore of Newark Bay westerly to Avenue A, and bounded on the north and south by lines parallel to and distant two thousand feet from the centre of Peddie Street, except at the northwest corner, where the boundary is the right of way of the New York Bay Railroad, containing about eleven hundred and fifty acres, *excepting* an area of about one hundred and thirty-six acres here-

tofore conveyed by The City of Newark to the United States Government.

Pursuant to certain acts of the Legislature of the State of New Jersey, approved October 21, 1907, Chap. 272; March 24, 1910, Chap. 47; April 16, 1912, Chap. 408; March 12, 1913, Chap. 70; April 23, 1915, Chap. 398; March 21, 1916, Chap. 249; March 19, 1917, Chap. 66; March 27, 1917, Chap. 152; and April 21, 1920, Chap. 331, The City of Newark has commenced and is engaged in prosecuting the work of improving said lands for transportation, shipping and industrial facilities and of establishing thereat a port terminal involving the construction of warehouses, piers, docks, bulkheads, slips, basins, ferries, docks and other facilities of commerce, known collectively as the Port Newark Terminal. In carrying out said project, The City of Newark has expended up to the present time the sum of about Six Million Five Hundred Thousand Dollars ($6,500,000), of which in excess of One Million Dollars ($1,000,000) has been expended in dredging Newark Bay. The said project contemplates that ocean going steamers and sailing craft engaged not only in intrastate but also in interstate and foreign commerce shall have free access to said terminal.

V.

For a number of years past The Central Railroad Company of New Jersey has maintained a double-track wooden bridge with bascule draws across the mouth of Newark Bay, below the City of Newark, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey. This

bridge, which crosses the channel of Newark Bay at an angle of approximately 66°, has become and is a serious obstruction to the navigation of Newark Bay by vessels seeking the Port Newark Terminal, the said bridge having been constructed and maintained pursuant to an Act of the Legislature of the State of New Jersey, approved February 23, 1860, entitled "A further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Eastern Railroad Company,' passed February 26, 1847."

VI.

Recognizing the facts set forth in the last preceding paragraph, the said The Central Railroad Company of New Jersey has for several years past been seeking authority to construct a substitute bridge, constructed of masonry and steel with four tracks and vertical draws, upon substantially the same location as the said existing bridge. The City of Newark has objected to the construction of such substitute bridge and has maintained and does maintain that the proper development of the navigation of Newark Bay and of its Port Newark Terminal requires the removal of all bridges at the point aforesaid, and either the construction of a tunnel under the waters of Newark Bay at the point where the present bridge exists, or the rerouting of the said railroad of the said The Central Railroad Company of New Jersey along the westerly shore of Newark Bay.

VII.

In its efforts to secure authority for the construction of such new bridge The Central Rail-

road Company of New Jersey secured the passage by Congress of an act entitled "An Act To Authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey," approved August 8, 1919 (41 U. S. Stats., 277), by which Act authority was granted to The Central Railroad Company of New Jersey to construct, maintain and operate a bridge and approaches thereto across Newark Bay in the State of New Jersey at a point suitable to the interests of navigation between the City of Elizabeth in the County of Union, and the City of Bayonne in the County of Hudson in said State in accordance with the provisions of the Act of Congress entitled "An Act To regulate the construction of bridges over navigable waters," approved March 23, 1906 (34 U. S. Stats., 84).

That it was in and by the said Act of March 23, 1906 (34 U. S. Stats., 84-86), in Section 6 thereof provided as follows:

> "That whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act."

That the said The Central Railroad Company of New Jersey failed to commence the actual construction of the bridge authorized by said Act approved August 8, 1919, within one year from the

date of the passage of said Act, to wit: on or before August 8, 1920, and thereupon by force of the provisions in the Act above set forth on said 8th day of August, 1920, the authority granted to said Railroad Company by the Act of Congress approved August 8, 1919, did cease, expire and become null and void. 37

VIII.

That by an Act of Congress approved February 15, 1921 (41 U. S. Stats., 1099), more than six months after the authority granted to said The Central Railroad Company of New Jersey to construct a bridge as aforesaid had expired and become null and void as aforesaid, which act was entitled: "An Act To extend the time for the construction of a Bridge across the navigable waters of the Newark Bay, in the State of New Jersey," defendant sought to have Congress revive said expired and void authority by extending the time for the commencement and completion of the construction of the said bridge authorized by Act of Congress approved August 8, 1919, aforesaid, two and five years respectively, from the date of the approval of the said Act of 1921. The right to alter, amend or repeal said Act was expressly reserved by Congress. 38 39

Complainant avers that inasmuch as the original authority granted by Congress had expired and become null and void, there was no provision authorizing the construction of the said bridge within a specified time in existence on February 15, 1921, which time could be extended by the Act of February 15, 1921, and therefore the said Act of February 15, 1921, was inoperative and did not confer upon The Central Railroad Company of

New Jersey any right of construction or maintenance of a bridge.

IX.

Complainant further avers that by an Act of the Legislature of the State of New Jersey entitled "An Act to create the New Jersey Harbor Commission and to define its powers and duties," approved April 8, 1914, Chapter 123, a Commission was created to be appointed by the Governor to be known as the New Jersey Harbor Commission. Section 4 of the said Act provided among other things as follows:

> "All plans for the development of any water front upon any navigable water or stream of this state, or bounding thereon, which is contemplated by any person, corporation or municipality, * * * which involves the construction, change, alteration or modification of a * * * bridge, * * * shall first be submitted to the said Commission, and no such development or improvement enumerated within the provisions of this section, * * * shall be commenced or executed without the approval of this Commission first had and received, * * *. Any development or improvement * * * which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; * * *."

By an Act of the Legislature of the State of New Jersey entitled "An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all powers and duties now devolved, by law, upon the Board of

Riparian Commissioners, the Department of In- 43
land Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," approved April 8, 1915, Chapter 242, a Department of Commerce and Navigation was established, the same to be governed by a board to be known as the Board of Commerce and Navigation upon which Board was devolved the powers conferred by the Act of 1914 aforesaid upon the New Jersey Harbor Commission.

Complainant further avers that pursuant to the provisions of the aforesaid statutes the said The Central Railroad Company of New Jersey on or about the 16th day of February, 1917, made 44
application to the said Board of Commerce and Navigation for the approval of its plans for the construction of a bridge on the site above mentioned to carry the main line of its railroad over Newark Bay together with detailed plans and specifications and other papers, which application after due consideration thereof on or about the 16th day of April, 1917, was denied by the said Board of Commerce and Navigation.

The Central Railroad Company of New Jersey thereafter and on or about the 12th day of June, 1918, made a new application to the said Board of 45
Commerce and Navigation for a permit to carry out the said work, which application also after due consideration thereof was on or about the 15th day of July, 1918, denied.

The said The Central Railroad Company of New Jersey on or about the 2nd day of February, 1922, made a further application to the said Board of Commerce and Navigation for a permit to carry out the construction and maintenance of its said bridge, which application also, after due

consideration thereof, was on or about the 19th day of June, 1922, denied; that the approval of said Board of Commerce and Navigation for the construction of the said bridge has never been obtained.

Complainant further avers that the said The Central Railroad Company of New Jersey has not complied with the provisions of the said Chapter 123 of the Laws of 1914 as amended by Chapter 242 of the Laws of 1915 of the State of New Jersey and that until it shall procure approval of its plans by the said Board and a permit therefor, any construction of said bridge or bridges thereon or the development or improvement in connection therewith is declared by law to be a purpresture and a public nuisance.

X.

Complainant further avers that pursuant to the authority of Chapter 154 of the Laws of 1921 of the State of New York and Chapter 151 of the Laws of 1921 of the State of New Jersey, an agreement was entered into between the States of New York and New Jersey by which there was created a district to be known as the Port of New York District, which embraces among other things all of the waters of Newark Bay, including the location of the existing and proposed new bridge of said The Central Railroad Company of New Jersey and there was furthermore created a body known as "The Port of New York Authority," defendant herein, consisting of six commissioners —three chosen by the State of New York and three by the State of New Jersey, having the powers and jurisdictions enumerated in said agreement, which agreement thereafter was rati-

fied by the Congress of the United States by a 49
Joint Resolution approved August 23, 1921 (42 U. S. Stats., 174), entitled:

"Public Resolution No. 17—67th Congress.

JOINT RESOLUTION.

"Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York."

50

That in and by the agreement or compact approved by Congress as aforesaid, on August 23, 1921, it was provided that the Legislatures of the two states prior to the signing of the said agreement or thereafter as soon as might be practicable, would adopt a plan or plans for the comprehensive development of the Port of New York. That thereafter a comprehensive plan for the development of the Port of New York, containing grants of power and authority to The Port of New York Authority to effectuate the same, was adopted and was approved by the State of New 51
York, by an Act approved February 24, 1922, being Chapter 43, Laws of 1922, and by the State of New Jersey by an Act approved February 23, 1922, known as Chapter 9 of the Laws of New Jersey of 1922, which compact was consented to by a joint resolution of Congress approved July 1, 1922 [42 U. S. Stats., 822], entitled:

"Public Resolution No. 66—67th Congress.

JOINT RESOLUTION.

"Granting consent of Congress and authority to the Port of New York Authority to exe-

52 cute the comprehensive plan approved by the States of New York and New Jersey by chapter 43, Laws of New York, 1922, and chapter 9, Laws of New Jersey, 1922."

Congress, by said joint resolution, "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution," gave its consent to the supplemental agreement between the States of New York and New Jersey aforesaid covering
53 the comprehensive plan for the development of the Port of New York embraced in the said statutes, and authorized and empowered said Port of New York Authority to carry out and effectuate the same.

The said comprehensive plan provided for the construction of certain tunnels and bridges to form part of the plan. It also provided for the construction of certain belt lines, including a belt line known as "Middle Belt Line," to connect New Jersey and Staten Island and the railroads on the westerly side of the port with Brooklyn, Queens, the Bronx and the railroads on the east-
54 erly side of the Port.

XI.

It was provided in Article 13 of the compact between the State of New York and the State of New Jersey aforesaid that:

> "The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, State or local au-

thority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port" (42 U. S. Stats., 178). 55 56

In and by the comprehensive plan approved as aforesaid it was further provided that:

"Section 8. The port of New York authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the Congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department, and the United States Shipping Board, for suitable assistance in carrying out said Plan. * * * It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said 57

58 plan. All municipalities within the district are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate. * * * The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *." (N. Y. Laws 1922, c. 43; N. J. Laws 1922, c. 9.)

59 The Joint Resolution of Congress aforesaid, approved July 1, 1922, referred to and approved the bridges, tunnels and belt lines forming the comprehensive plan which were generally and in outline indicated on the maps filed by The Port of New York Authority in the offices of the Secretaries of the States of New York and New Jersey and were in said Joint Resolution described in outline.

XII.

60 That the existing bridge of the said The Central Railroad Company of New Jersey and the proposed new bridge to be constructed by it are not made a part of the comprehensive plan authorized by the said compact and said resolution, and are not shown on said comprehensive plan, but are in conflict therewith, obstructive thereof and inimical thereto.

Complainant further avers that the defendant, The Central Railroad Company of New Jersey, has not secured the consent or approval of the defendant, The Port of New York Authority, for the construction of the said proposed bridge, and that said bridge cannot lawfully be constructed without such consent or approval.

XIII.

That complainant is informed and believes and therefore avers that the said The Port of New York Authority has informed the Secretary of War that if a large capital expenditure be now made such as is proposed in the construction of the said new bridge by the said The Central Railroad Company of New Jersey, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such bridge, and thus impose for an indefinite period in the future serious limitations on the development of the marine possibilities of the Port; that the Engineers of the said The Port of New York Authority in studying the problem of the Port and in framing the Comprehensive Plan aforesaid, expressly excluded from the development of such plan any bridge at the point aforesaid, because such a bridge would constitute an obstacle to the proper development of the Port of New York.

Complainant is informed and believes and therefore avers, that the said The Port of New York Authority not only has not authorized the construction of the said proposed new bridge of the said The Central Railroad Company of New Jersey, but is unwilling to authorize the same.

XIV.

Complainant further avers that neither the maintenance of the present bridge nor the construction of the proposed new bridge is necessary to the proper maintenance and operation of the railroad of the said The Central Railroad Company of New Jersey. The said Railroad Company owns and operates a line of railroad diverging from near the point where it reaches the

64 said present bridge at Elizabethport, New Jersey, along the westerly shore of Newark Bay, northward to a point in the City of Newark opposite the confluence of the Passaic and Hackensack Rivers, where it runs over another bridge owned by the said railroad company across the mouths of the said Passaic and Hackensack Rivers above the portion of Newark Bay navigable by ocean going vessels. This branch of the defendant railroad proceeds from the eastern end of the said bridge until it intersects with its present line leading from Bayonne to Communipaw. Com-
65 plainant avers that the line of the defendant railroad operating across the mouths of the Passaic and Hackensack Rivers is adequate for the needs of the said railroad company without the construction and maintenance of the proposed new bridge.

XV.

Complainant therefore on information and belief alleges that the construction of the said proposed new bridge by The Central Railroad Company of New Jersey not only would be an unlawful purpresture but would constitute an insuper-
66 able obstacle to the proper carrying out of the comprehensive plan for the development of the New York Port District, and would seriously interfere with the development of the Port Newark Terminal in which complainant has a large pecuniary investment and upon the further development of which is dependent the reception by it of any adequate return upon such investment.

XVI.

Complainant further avers that because of the threatened construction of the said new bridge

it has been unable to secure tenants of the property owned by it at the said Port Newark Terminal, that parties negotiating with it for dock, pier, warehousing and other facilities have refrained from completing such negotiations because of the threatened construction of said proposed bridge. 67

XVII.

Complainant further avers that on or about the 29th day of December, 1922, the Secretary of War and the Chief of Engineers purporting to act pursuant to authority in them vested by acts of Congress, approved the plans of the said The Central Railroad Company of New Jersey for a new bridge across the south end of Newark Bay replacing the existing bridge at that point. Complainant avers that such action was arbitrary, and is informed and believes that such action is wholly void and without authority in law because of the matters and things herein set forth. Complainant further avers that such action and the acts of Congress upon which the said Secretary of War and said Chief of Engineers purported to rely were and are in violation of the rights guaranteed to it by the Fifth Amendment to the Constitution of the United States, and constitute an attempted usurpation of the powers reserved in the Constitution of the United States to the States respectively, or to the people, and are therefore in violation of the Tenth Amendment to the Constitution of the United States, so that said Acts of Congress conferred upon the said Secretary of War and said Chief of Engineers no authority to take the action aforesaid in regard to said proposed bridge. 68 69

70 XVIII.

Complainant further avers that if the said proposed bridge, or any bridge, between the said cities of Bayonne and Elizabeth, be constructed, the free and unobstructed access of river and ocean going vessels to the wharves, docks, and other facilities of its Port Newark Terminal will be prevented and the value of said Terminal to complainant destroyed; and that the authority purported to be given to defendant The Central Railroad Company of New Jersey by the Acts of Congress of August 8, 1919, and
71 February 15, 1921, and by the said action of the Secretary of War and the Chief of Engineers is null and void and in disregard of complainant's rights under the Fifth Amendment to the Constitution of the United States.

XIX.

Complainant further avers that defendant The Central Railroad Company of New Jersey has already commenced the construction of said new bridge under the pretended authority of the permit issued by the Secretary of War above re-
72 ferred to; that in case it shall proceed with such construction the rights and property of complainant will be irreparably injured as above set forth and that complainant can have redress only in a Court of Equity to which jurisdiction in such behalf rightfully appertains.

XX.

Complainant further avers that the matter in controversy exceeds the sum of Three thousand dollars ($3,000), exclusive of interest and costs.

WHEREFORE, complainant prays: 73

1. That writs of subpoena issue directed to defendants The Central Railroad Company of New Jersey and The Port of New York Authority, commanding each of them to appear herein and answer, but not under oath (oath being expressly waived), the allegations contained in the foregoing Bill of Complaint, and abide by and perform such orders and decrees as the Court may make in the premises.

2. That the Court adjudge that by reason of its direct pecuniary interest this complainant is entitled to maintain this suit to enjoin and restrain 74
the threatened construction of a bridge by the defendant The Central Railroad Company of New Jersey, as hereinbefore set forth.

3. That the Court adjudge that The Central Railroad Company of New Jersey is without right or power to construct the proposed new bridge at or near the site occupied by its present bridge over the waters of Newark Bay and that the threatened construction thereof would constitute an unlawful purpresture and a public nuisance.

75

4. That the Court adjudge the Acts of Congress approved August 8, 1919, and February 15, 1921, to be in violation and contravention of the rights of this complainant because not authorized by, but in violation of the Constitution of the United States and the Amendments thereof.

5. That the Court adjudge the construction of said bridge without the permission of the said The Port of New York Authority and/or of the

76 Board of Commerce and Navigation of the State of New Jersey to be unlawful and void.

6. That, temporarily pending this suit, as well as permanently, the defendant The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns, be enjoined and restrained from proceeding with the construction of the said bridge and that an injunction be granted herein forever enjoining and restraining the said defendant, its officers, agents and servants, and its or their successors and assigns, from proceeding with such construc-
77 tion.

7. That this complainant have such other or further relief as may be meet and agreeable to equity.

JEROME T. CONGLETON,
Corporation Counsel and Solicitor
for Complainant,
Office and Post Office Address City Hall,
Newark, N. J.

GEORGE W. WICKERSHAM,
Of Counsel.

78 UNITED STATES OF AMERICA,
District of New Jersey, } ss.:

JEROME T. CONGLETON, being duly sworn, deposes and says that he is Corporation Counsel of the City of Newark and in charge of the proceedings herein; that he has read the foregoing bill of complaint and is familiar with the contents thereof; that the matters and things therein set forth, so far as they relate to the acts and deeds of the City of Newark, are true, and, so

far as they relate to the acts and deeds of others, he believes them to be true. 79

JEROME T. CONGLETON

Sworn to before me this 11th day of January, 1923.

C. HUBERT DERIVAUX
A Notary Public of New Jersey

[NOTARIAL SEAL]

Affidavit of Charles W. Staniford, Read on Behalf of Appellants. 80

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY *et al., Defendants.*

81

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, ss.:

CHARLES W. STANIFORD, being duly sworn, says:

1. That he is a consulting engineer having an office at No. 30 Church Street, in the City of New York; that for thirteen years, to-wit: from 1906 to 1919, he was Chief Engineer of the New York Dock Department; that he is a member, and was formerly Director, of the American Society of

82 Civil Engineers; that since 1919 he has practiced his profession as a consulting engineer and has specialized in harbor and terminal work and railroad and tunnel survey and construction; that he has had extensive experience in the laying out of bulkhead and pierhead lines, and in measuring river and harbor currents and in designing docks, wharves, slips and terminal facilities.

2. That he has, as Resident or Division Engineer, personally planned and built three tunnels, one on the South Pennsylvania Railroad, and two on the Louisville & Nashville Railroad. As Chief
83 Engineer of the New York City Dock Department for 13 years he was in constant close connection with the design, construction and maintenance of practically all tunnels entering Manhattan Island. It was his duty during this period to collaborate with the engineers in charge of the construction of all tunnels affecting the City's piers, bulkhead walls, and ferry houses, and to approve the plans in so far as they affected the said property of the City of New York and to follow closely the work of construction in the same regard.

3. That he has personally examined and is
84 familiar with the topography in the neighborhood of the Kill Van Kull, Shooter's Island, Newark Bay, and the shore line of the cities of Bayonne, Elizabeth and Elizabethport, New Jersey; that more especially, he is familiar with the exact position of an existing two-track wooden bridge with bascule draw now in use by the defendant, The Central Railroad Company of New Jersey, between the cities of Bayonne and Elizabeth, New Jersey. That ocean going vessels having passed through that portion of New York Harbor known

as the "Narrows" can only approach Newark Bay 85
and the Passaic and Hackensack Rivers by proceeding through a strait of water known as the Kill Van Kull, separating Bayonne, New Jersey, from Staten Island, New York; that vessels having proceeded through the Kill Van Kull are compelled to verge immediately to the north to avoid Shooter's Island and the shoals in the vicinity thereof, and having so verged to the north come immediately upon the existing bridge of the defendant Railroad Company between the cities of Bayonne and Elizabeth, New Jersey; that a vessel in approaching the draw in the aforesaid bridge, 86
being met with strong river currents, bearing down from the north, is unable to come to rest and, if the dangers of grounding or collision are to be avoided, must necessarily proceed northward and pass through the bridge, so as to avoid the possibility of being driven south on to the shallows surrounding Shooter's Island, or of being swung around so as to be parallel with the bridge; that this circumstance renders the approach to the said drawbridge of peculiar difficulty and danger to navigators, and that only under favoring circumstances is it possible to steer with safety and accuracy into the channel afforded by 87
the aforesaid drawbridge.

4. That if the difficulties and dangers attendant upon a safe passage through the aforesaid drawbridge are not successfully met, and the vessel so attempting to pass through is driven into collision with the aprons or other parts of the said drawbridge, the result is completely to close the approach to Newark Bay from the sea; that, however, on such occasions The Central Railroad Company of New Jersey is not seriously ham-

88 pered, even though this drawbridge may be kept open due to the grounding or other impeding of the progress of a vessel through the said drawbridge, the said Company having an alternative mode of approach to its terminals in the cities of Jersey City (Communipaw Section) and Bayonne, New Jersey, by diverting its trains from a point in Elizabethport northward through Newark and over the bridge used by the Newark & New York Branch of the said Railroad over the Passaic and Hackensack Rivers above the Port Newark Terminal.

89 5. That deponent has made a special study of the possibilities of doing away with the existing situation and the existing difficulties in the way of approach to Port Newark Terminal on the part of the ocean going vessels. That the said difficulties and obstructions may be done away with by any one of four methods:

(1) A tunnel might be constructed between the cities of Bayonne and Elizabeth, New Jersey, with a sufficiently easy grade to permit of the operation of trains through it by means of steam engines, the cost of a tunnel so constructed not being in
90 excess of $29,000,000.00.

(2) That a tunnel for operation with electric engines or cars having a grade not exceeding 2.09 per cent. and a length not exceeding 8,450 feet could be constructed by any one of the following methods at the estimated cost set forth opposite each:

Shield with concrete block....	$22,829,000.00
Ordinary shield method.....	26,209,000.00
Open trench method.....	28,191,000.00

The aforesaid figures include the cost of electrification through the tunnel. Deponent believes that the delay to trains due to the necessity of coupling and uncoupling of electric engines would not exceed an average of 12 minutes per train. 91

(3) At an expenditure of $14,275,000, a method could be worked out for doing away with either a bridge or tunnel at the point in question, by re-routing passenger trains north from Elizabethport, through Newark, over the bridge over the Passaic and Hackensack Rivers, now operated by the Newark & New York Branch of the defendant railroad, into its present passenger terminal, and 92
by re-routing freight trains over this same bridge, a new connecting line to be built connecting the eastern end of said bridge with the entrance to the Communipaw Freight Yard at Chapel Avenue in Jersey City. Such a method of obviating the difficulty would cause an increase in the running time of freight trains to the Chapel Avenue Terminal (assuming their average speed to be 15 miles per hour) of 9.76 minutes, the additional mileage being 2.44 miles; and would increase the running time of passenger trains (assuming their average speed to be 30 miles per hour) by 1.10 minutes, the additional mileage being 0.6 miles—these increases in running time being duly capitalized and included in the foregoing estimate of the cost of this method. 93

(4) That a fourth method of doing away with the difficulty and obstruction caused by the existing bridge would be for the defendant railroad to re-route its traffic from Elizabethport to the Oak Island Yard of the Lehigh Valley Railroad and Pennsylvania Railroad; thence across Newark Bay, parallel with the existing bridge maintained

94 above Port Newark Terminal by the Lehigh Valley Railroad and Pennsylvania Railroad to the entrance of the Communipaw Yard at Chapel Avenue, Jersey City. This method would increase the running time of freight trains (assuming their average speed to be 15 miles per hour) by 4.44 minutes, the increased distance to be traversed being 1.11 miles, and would increase the running time of passenger trains (assuming their average speed to be 30 miles per hour) by 1.10 minutes, the increased mileage of passenger trains being 0.6 miles; that the cost of this method, including proper capitalization of the
95 delays in running time, would be $16,782,000.00.

An alternative under the fourth method herein would be to construct a connecting line following method No. 4 from Elizabethport to the east end of the proposed Newark Bay Bridge, parallel to the Lehigh-Pennsylvania Bridge, thence diverting north along the east side of Newark Bay to an intersection with method No. 3, near the Hudson County Boulevard, then following method No. 3 to the entrance to the Communipaw Yard at Chapel Avenue, Jersey City; such a method would increase the mileage for freight trains by 1.47
96 miles and their running time 5.88 minutes, and would increase the mileage for passenger trains by 0.6 miles and their running time by 1.10 minutes. The cost of this method, with due capitalization of the increased running time, is estimated at $21,679,000.00.

6. That all of the foregoing estimates of costs are of necessity only approximate, but have been reached by deponent after careful detailed calculations with due allowance for all elements which deponent, from his practical experience as

an engineer, knows should be reckoned with in such undertakings. 97

CHAS. W. STANIFORD.

Sworn to before me this 11th day of January, 1923.

FREDERICK T. FROST, Notary Public. Kings Co. No. 31, Kings Co. Register's No. 4027; Certificate filed N. Y. Co. No. 52; N. Y. Co. Register's No. 4061; Commission expires Mar. 30, 1924.

[NOTARIAL SEAL]

98

Affidavit of Henry R. Lewis, Read on Behalf of Appellants.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

CITY OF NEWARK, *Complainant,*

against

CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al.*, *Defendants.*

99

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

HENRY R. LEWIS, being duly sworn, deposes and says:

1. That he is the Operating Manager of the Trans-Marine Corporation, having his office at Port Newark, New Jersey, one of his duties being to advise incoming and outgoing vessels as to

100 conditions prevalent in Newark Bay in the vicinity of and just below the Port Newark Terminal; that he has had thirty-three years of service at sea and for nineteen years was the master of various vessels owned and operated by the International Mercantile Marine Co.

2. That as such Operating Manager he has spent between two and three weeks in making a detailed examination of tidal conditions, river and channel currents, etc., in the vicinity of Port Newark Terminal, with particular regard for conditions to be met by ocean-going vessels proceeding
101 from New York Harbor to Port Newark Terminal and from Port Newark Terminal to the open ocean, that his method has been to employ a small motorboat in order to make the most direct examination possible of navigating conditions between Port Newark Terminal, above the present drawbridge of the defendant Railroad Company, between Bayonne, New Jersey, and Elizabeth, New Jersey, and the Kill Van Kull and Staten Island Sound, which are the only two straits of water through which ocean traffic can approach the aforesaid Port Newark Terminal.

102 3. That the mode of approach to Port Newark Terminal employed by the majority of incoming ocean or coastwise vessels is through the Kill Van Kull, thence between the southerly shore of a certain headland, known as Bergen Point, on which is built the City of Bayonne, New Jersey, and the island at the western end of the said Kill Van Kull, known as Shooter's Island; and that between these two areas of land the navigable passage is two hundred feet in width.

4. That after passing through said passage and verging toward the north in order to approach the drawbridge of the defendant Railroad Company, between Bayonne, New Jersey, and Elizabeth, New Jersey, vessels are unable to pause to await the opening of the drawbridge because of the following circumstances: Practically all vessels which approach the Port Newark Terminal are single screw vessels; a single screw vessel, whose screws revolve to the right (as is generally the case), is unable to hold its position in any body of flowing water (by the usual means of slowly revolving the screw) without a dragging of the stern to the port side of the vessel; the effect of such dragging is to make the vessel approach a position parallel with the existing drawbridge, which does not cross the channel of Newark Bay at right angles, but at an angle of about 66 degrees; the result, therefore, is that (unless the vessel makes fast to at least two tugs—a proceeding which involves an average cost to each vessel for the passage in and out of about $400, the cost being greater if tidal conditions make a departure between 5 P. M. and 7 A. M. necessary) a safe passage through said draw is only possible when the vessel is permitted to approach it without stopping, conditions which rarely, if ever, prevail in the case of a drawbridge over which trains are operated at close intervals. 103 104 105

5. To reduce the difficulties resulting from the foregoing conditions, vessels approaching Port Newark Terminal are of necessity compelled to approach it only at slack water, that is to say, at a moment when there is no tide movement. If the draw were approached upon the rising of the tide, the drifting of the vessel into the parallel position

106 described above would be unavoidable; if a vessel were to approach the draw upon the falling tide a delay due to the passage of a train or trains might last a sufficient time for the falling of the tide to cause the nose of the vessel to run aground, with the attendant possibility that the vessel would break in two, the nose being aground while the stern would be afloat. A vessel so stranded has no chance of being floated until the return of high tide. The period of slack water favorable to the movement of vessels lasts approximately twenty minutes at high tide and approximately the same length of time at low tide.

107 6. Vessels departing from Port Newark Terminal cannot go out on a receding tide because if, after the vessel has left its dock, the passage of a long, slow-moving freight train were to delay the opening of the draw, it would be impossible to hold the vessel against the tide movement and impossible to prevent a collision between the vessel and the closed bridge. Vessels, therefore, must depart from Port Newark Terminal upon an incoming tide in order to navigate the draw safely. At certain seasons of the year a departure is

108 fraught, even under these circumstances, with unusual dangers, for during the late winter months and during the Spring of the year, freshets in the waters of the Passaic and Hackensack Rivers make the retarding effect of the incoming tide almost negligible, so that the vessel is in almost as dangerous a position as it would be if it were to start out upon an ebb tide. The late Winter and Spring freshets, moreover, produce a situation of peculiar danger to vessels, because there is at such times one movement upon the surface of the water, i. e., down-stream, and another move-

ment in the waters underneath the surface of the water, i. e., up-stream, making the navigation of a vessel, at best, little more than a matter of guesswork. 109

7. That the height of the masts with which seventy-five per cent of the lighters operated in connection with the vessels of the Trans-Marine Corporation between Port Newark Terminal and New York Harbor points are equipped, is such that these lighters cannot pass under the proposed bridge of The Central Railroad Company of New Jersey (the fixed portions of which deponent is informed are to have a clearance of but 35 feet above mean high water), unless the draw is opened. 110

8. The existing drawbridge is the cause of a substantial increase in insurance rates in policies covering vessels which propose to use the Newark Terminal because: (1) the risk of loss of time to the vessel from grounding is greatly increased; (2) the likelihood of damage to the vessel from grounding is greatly increased; (3) the chances of causing damage to railroad property by drifting vessels is unusually great.

H. R. LEWIS 111

Sworn to before me this 11th day of January, 1923.

RUSSELL STILES
Notary Public for Westchester County

[NOTARIAL SEAL]

Certificate filed in N. Y. County
N. Y. Co. Clerk's No. 774. N. Y. Co. Reg. No. 4633
My commission expires March 30, 1924.

112 **Affidavit of F. J. Stillwaggon, Read on Behalf of Appellants.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, *Defendants.*

113

UNITED STATES OF AMERICA, }
EASTERN DISTRICT OF NEW YORK, } ss.:

F. J. STILLWAGGON, being duly sworn, deposes and says:

1. That he is a pilot engaged in the piloting of vessels in New York Harbor and its environs; that he has piloted vessels in and out of Newark Bay for over 30 years past, and is entirely familiar with the conditions in said Bay.

114 2. That the present bridge of the Central Railroad Company of New Jersey between Bayonne and Elizabeth, New Jersey, has bascule draws of a width of about 85 feet. A bascule draw is a draw which opens like a pen knife, so that when the said draw is open there is no limit to the height of vessels which may pass through it. The navigation of ocean going vessels through the present draw is extremely precarious because of the difficulty of holding vessels while waiting for the draw to open, and because of tidal conditions. It is necessary to have the assistance of tugs in

taking vessels through the draw, and even with these tugs it is impossible to pass through the draw if there is a heavy wind. 115

3. That he is informed that the proposed new bridge of the Central Railroad Company of New Jersey is to have a vertical draw with a clearance of 135 feet above mean high water when open. A draw of this type rises in a horizontal position, and when it is fully open vessels whose masts do not exceed 135 feet above mean high water in height may pass through; vessels with higher masts may not unless they are equipped with folding masts or hinged masts. 116

A great many of the ocean going cargo vessels entering New York Bay are equipped with masts exceeding 135 feet in height above mean high water, and none of them has folding or hinged masts, so far as he is informed.

4. That up to the present time he has only known of one vessel whose masts exceeded the height mentioned passing through the present bridge of the Central Railroad Company of New Jersey, but in the future development of Newark Bay he believes that there will be many such. The vessel which is mentioned as having passed through the draw of the present bridge could not pass through the proposed bridge. That he regards the construction of any bridge which imposes a limitation upon the mast height of vessels passing through it as a serious impediment to the development of Newark Bay. 117

5. That he is informed that the proposed bridge of the said company is to have a clearance of 35 feet above mean high water. It would therefore not be necessary to open the draw of the pro-

118 posed bridge for any vessel whose mast height did not exceed such 35 feet. This class would include scows without masts or booms, and most tugs. A large part of the traffic in Newark Bay however consists of steam lighters and barges. Practically all barges have booms running from 35 feet above mean high water up, and sticks from 65 feet up. No steam lighter that he knows of could pass under a 35-foot clearance. It would be therefore necessary to open the proposed bridge for all barges and steam lighters as well as larger vessels. The draw would therefore be
119 open constantly even under the present conditions in Newark Bay, and as the development of the said Bay increases, he is of opinion that there would be most serious conflict between the interests of The Central Railroad Company of New Jersey in seeking to have its trains pass over the said bridge, and the interests of persons wishing to pass up or down Newark Bay in vessels.

F. J. STILLWAGGON

Sworn to before me, this 11th day of January, 1923.

120 [NOTARIAL SEAL] FREDERICK T. FROST, Notary Public. Kings Co. No. 31. Kings Co. Register's No. 4027; Certificate filed N. Y. Co. No. 52; N. Y. Co. Register's No. 4061; Commission expires Mar. 30, 1924.

Affidavit of Victor Gelineau, Read on Behalf of Appellants. 121

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants. 122

UNITED STATES OF AMERICA, }
DISTRICT OF NEW JERSEY, } ss.:

VICTOR GELINEAU, being duly sworn, deposes and says that he is the Director of the Board of Commerce and Navigation of the State of New Jersey; that The Central Railroad Company of New Jersey has made three applications before the said Board for permission to construct a bridge over the Newark Bay between Bayonne, New Jersey, and Elizabeth, New Jersey. Said applications were made on February 16, 1917, 123
June 12, 1918, and February 2, 1922. Deponent has the custody of the records of said Board and is familiar with the proceedings that were taken upon said applications.

The said applications were denied on April 16, 1917, July 18, 1918, and June 19, 1922, respectively.

Deponent further says that no permit or approval of the said Board has been given to the Central Railroad Company of New Jersey for

124 the construction of any bridge at the site above mentioned.

VICTOR GELINEAU.

Sworn to before me this 11th day of January, 1923.

[NOTARIAL SEAL] WILLIAM H. BEARDSLEY
Notary Public for New Jersey

Affidavit of Thomas L. Raymond, Read on Behalf of Appellants.

125 UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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126 UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, } ss.:

THOMAS L. RAYMOND, of full age, being duly sworn according to law, on his oath deposes and says:

1. That he is the Director of the Department of Streets and Public Improvements of the City of Newark, a municipal corporation of the State of New Jersey, and as such the care, custody and control of the Port Newark Terminal Develop-

ment for transportation, shipping and industrial facilities in the City of Newark on the westerly shore of Newark Bay is imposed upon him by law. 127

2. That he has been such Director of the Department of Streets and Public Improvements since November 20th, 1917, and that prior to said date, from January 1st, 1915, he was the Mayor of the City of Newark.

3. That the Port Newark Terminal of the City of Newark is located about two miles north of the present bridge of the Central Railroad Company of New Jersey, across the mouth of Newark Bay between the Cities of Elizabeth in the County of Union and Bayonne in the County of Hudson, New Jersey. 128

4. That the City of Newark in 1907, through its then Board of Street and Water Commissioners, the body charged by law with the establishment of docks and shipping facilities, pursuant to the provisions of Chapter 272 of the laws of New Jersey for the year 1907 designated the following described area in the Newark Great Salt meadows for the purpose of establishing and maintaining a system of public docks and shipping facilities comprising about 1100 acres in area, and being more particularly described as follows: extending from the pierhead line along the west shore of Newark Bay westerly to Avenue A. and bounded on the north and south by lands parallel to and distant 2,000 feet from the center of Peddie Street, except at the northwest corner, where the boundary is the right of way of the New York Bay Railroad. 129

130 5. That for seven years thereafter the City of Newark acquired from time to time, by purchase or condemnation property within the zone development thus established, by parcel, until in 1914 the city had acquired the major portion of the land in said area.

6. On January 1st, 1914, this deponent is informed and believes the work of developing the said area for docks and shipping facilities was commenced by the City and in 1916 an area of approximately 300 acres had been reclaimed with material dredged from an inland channel 400 feet
131 wide and 20 feet deep, connecting with the Government channel in the Bay, and a marginal dock was constructed along the entire north side of the inland ship channel dredged by the City of Newark.

7. With the entrance of this country into the World War in 1917 the Federal Government took over from the City of Newark a portion of this developed property, namely, 136 acres located between Doremus Avenue and the right of way of the Elizabethport branch of The Central Railroad Company of New Jersey, for use as an Army
132 Supply base, first leasing the property from the City with an option to purchase which was subsequently exercised by the Federal Government after the signing of the Armistice; the deed of conveyance by the City of Newark to United States of America, however, contained a reservation giving to the City the prior right of repurchase in event of sale of the same by the United States of America. About the time of making said lease with the Federal Government the City leased the remainder of its then developed prop-

erty between Doremus Avenue and the shore of 133
Newark Bay to the United States Shipping Board Emergency Fleet Corporation, comprising an area of about 113 acres including streets. Upon these two areas the Federal Government, or its agencies, during the war constructed warehouses and a shipyard, together with the necessary appurtenances, at a cost of many millions of dollars. This deponent is informed and believes that the dock serving the army base and shipyard is 7,000 feet in length, is equipped with cargo handling machinery and has rail connections with the Pennsylvania Railroad, the Central Railroad of 134
New Jersey and the Lehigh Valley Railroad systems, and there is a fully equipped belt line railroad serving these two areas known as the Atlantic Port Railroad Company.

8. Up to November 30, 1922, the City of Newark had acquired about 1,200 acres of land in this development zone and immediately contiguous thereto, together with the riparian grants from the State of New Jersey for a distance of 4,000 feet along the westerly shore of Newark Bay, and has expended about $6,500,000 on account of this public improvement. 135

9. During 1921, a thirty foot channel, 200 feet wide from Kill Van Kull to a point 1,000 feet in shore in the ship channel of said Port Newark Terminal, was completed at a cost of about $1,000,000 to the City of Newark, which work was done by the City at its own expense with the consent of the Federal Government and the State of New Jersey. The City of Newark has also just completed the construction of a bulkhead 4,400 feet in perimeter, extending out into Newark Bay

136 from the old shore line on the south side of the ship channel whereby an area of 70 acres of mud flats which were under water have been reclaimed, and directly west of this bulkhead area the City of Newark has reclaimed approximately 250 additional acres of land. That in November, 1922, the City of Newark let a contract for the widening of a portion of the said ship channel from 200 feet to the entire width of 670 feet, involving a cost of about $135,000. This work is now under way. That in December, 1922, the City let a contract for the building of a portion of a new dock in the
137 said Terminal at a cost of about $200,000.

10. Railway service to the Port Newark Terminal is furnished by five trunk lines. Immediately adjoining the entire Port area on the north is the property of the Pennsylvania Railroad, where there is being constructed the largest freight classification yard in the world as this deponent is informed and believes. Next to this, to the north, is the present Oak Island yard of the Lehigh Valley Railroad. The trackage of both of these roads is used by the Baltimore & Ohio, and the Philadelphia & Reading Railroads. Cutting across the entire property
138 zone of the Port Newark Terminal running north and south, is the Elizabethport branch of the Central Railroad Company of New Jersey, which also has a large classification yard.

11. That the City of Newark has up to the present time expended as aforesaid a large sum of money to develop this Port Newark Terminal, and has dredged a 30 foot channel in Newark Bay from Kill Van Kull in order to make the terminal avail-

able for ocean going shipments as a relief from 139
the present congested conditions existing in New York Bay, and has therefore objected to substitution by The Central Railroad Company of New Jersey of a new bridge in place of the existing bridge across Newark Bay, and has maintained and does maintain that the proper development of the navigation of Newark Bay in connection with the said Port Newark Terminal for the deep water navigation it is designed to accommodate, requires removal of all bridges including the present as well as the proposed new bridge of the Central Railroad Company of New Jersey, below 140
the Newark development, and that a practical alternative for any bridge across Newark Bay at the proposed location, would be either the construction of a tunnel under the waters of Newark Bay at a point where the present bridge exists or a re-routing of the railroad of The Central Railroad Company of New Jersey along the westerly shore of Newark Bay.

12. That the City of Newark has consistently protested against the efforts of the Central Railroad Company of New Jersey to secure permission to substitute a new bridge for its present 141
bridge across Newark Bay between the cities of Elizabeth and Bayonne; before the Board of Commerce and Navigation of the State of New Jersey which disapproved of the application made to it for that purpose by the Railroad Company, before the District Engineer of the Port of New York, the Chief of Engineers of the War Department and before the Secretary of War.

142 13. Attached hereto and made a part hereof are the following: A map prepared by the City of Newark showing the location of Port Newark Terminal and its environs, and an aerial photograph of the same marked respectively Exhibits "A" and "B."

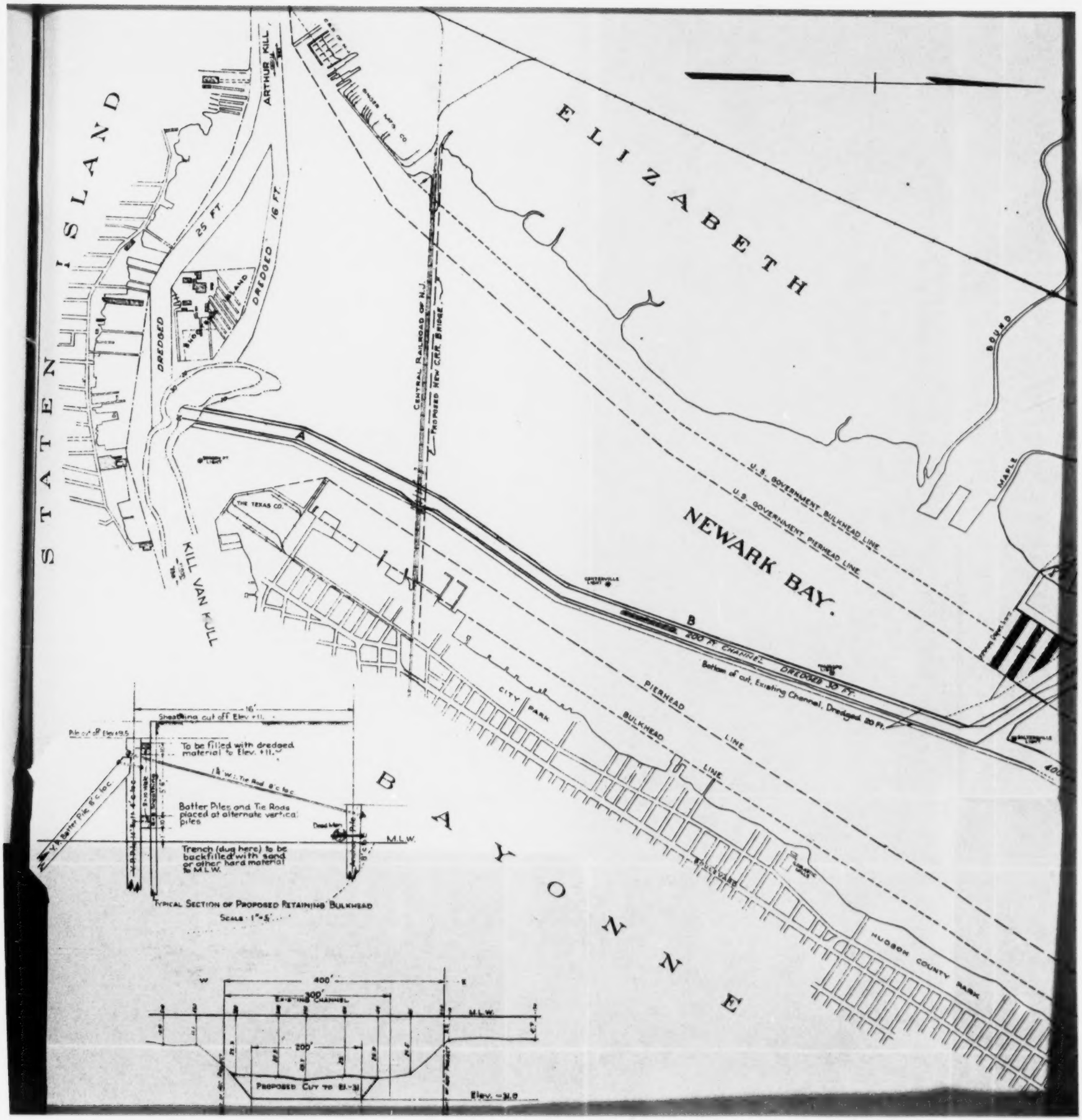
THOMAS L. RAYMOND.

Sworn and subscribed to before me,
this 11th day of January, 1923.

[NOTARIAL SEAL] JOSEPH G. WOLBER
A Notary Public of New Jersey

143

144


STATEN ISLAND
ELIZABETH
ARTHUR KILL
DREDGED 25 FT.
DREDGED 16 FT.
KILL VAN KULL
CENTRAL RAILROAD OF N.J.
PROPOSED NEW C.R.R. BRIDGE
THE TEXAS CO.
U.S. GOVERNMENT BULKHEAD LINE
U.S. GOVERNMENT PIERHEAD LINE
NEWARK BAY.
200 Ft. CHANNEL DREDGED 30 FT.
Bottom of cut, Existing Channel, Dredged 20 Ft.
PIERHEAD LINE
BULKHEAD LINE
CITY PARK
BAYONNE
HUDSON COUNTY PARK
MARLE
Sheathing cut off Elev. +11.
To be filled with dredged material to Elev. +11.
Batter Piles and Tie Rods placed at alternate vertical piles
Trench (dug here) to be backfilled with sand or other hard material to M.L.W.
M.L.W.
TYPICAL SECTION OF PROPOSED RETAINING BULKHEAD
SCALE: 1"=5'
400'
300'
EXISTING CHANNEL
200'
PROPOSED CUT TO EL.-31
Elev. -31.0

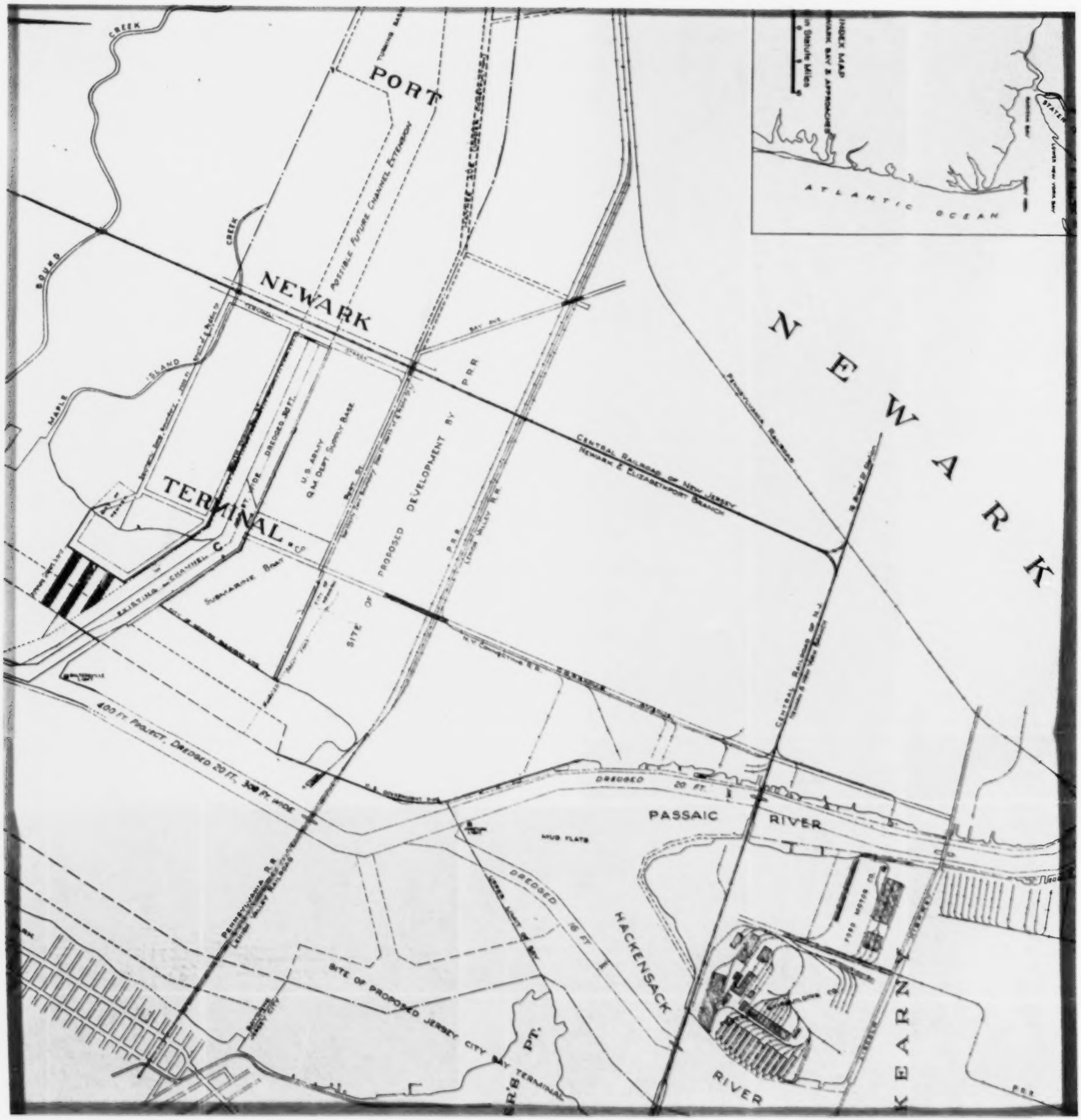

PORT
NEWARK
NEWARK
TERMINAL
PASSAIC
RIVER
HACKENSACK
RIVER
KEARNY
PROPOSED DEVELOPMENT BY P.R.R.
SITE OF PROPOSED JERSEY CITY MY TERMINAL
DREDGED 20 FT.
DREDGED 18 FT.
MUD FLATS
U.S. ARMY Q.M. DEPT SUPPLY BASE
SUBMARINE BASE
EXISTING CHANNEL
400 FT. PROJECT, DREDGED 20 FT., 300 FT. WIDE
PENNSYLVANIA R.R.
CENTRAL RAILROAD OF NEW JERSEY
NEWARK & ELIZABETHPORT BRANCH
INDEX MAP
ATLANTIC OCEAN

Exhibit B.

Motion to Dismiss.

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IN THE

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF NEW JERSEY.

[Motion of The Central Railroad Company of New Jersey to Dismiss the Bill of Complaint.]

THE CITY OF NEWARK, *Complainant,*

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, *et al., Defendants.* 158

To:

JEROME T. CONGLETON, Esq., *Solicitor for Complainant.*

Sir:

PLEASE TAKE NOTICE that on Wednesday, the 24th day of January, 1923, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, the undersigned will apply to the United States District Court at the Federal Building, in the City of Newark, New Jersey, for an order dismissing the bill of complaint filed in the above entitled cause as against the defendant The Central Railroad Company of New Jersey, at the cost of the complainant, upon the ground that said bill of complaint is without equity on its face and does not state any cause of action against said de- 159

160 fendant, and that the Court may not grant the relief prayed for or any part of the same.

Dated, January 15, 1923.

Yours respectfully,

GEORGE HOLMES,
Solicitor for Defendant, The Central Railroad Company of New Jersey.

Answer of Defendant, The Port of New York Authority.

161

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—No. 4033.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

162

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The Port of New York Authority, by Julius Henry Cohen, its counsel and solicitor, answering the complaint of The City of Newark, complainant herein, alleges:

Answer of Defendant, The Port of New York Authority

I.

It admits the truth of the allegations contained in Paragraphs I, II, III, X and XI.

II.

It admits the truth of Paragraph IV, except that it has no knowledge or information sufficient to form a belief as to the accuracy of the descriptions in said paragraph or the effect of the acts of the Legislature of the State of New Jersey therein referred to, or as to the accurate amount of money which The City of Newark has expended in dredging Newark Bay.

III.

It admits the passage by Congress of the act approved August 8, 1919, 41 U. S. Stats., 277, and the act of March 23, 1906, 34 U. S. Stats., 84, but it has no knowledge or information sufficient to form a belief as to the other allegations in Paragraph VII and prays that this Court determine whether or not "the authority granted to said Railroad Company by the Act of Congress approved August 8, 1919, did cease, expire and become null and void."

IV.

It admits that The Central Railroad Company of New Jersey has maintained a double track wooden bridge with bascule draws across the mouth of Newark Bay, below the City of Newark, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey, and that this said bridge is an obstruction to the navigation of New-

166 ark Bay by vessels seeking the Port Newark Terminal.

V.

It admits that The City of Newark has objected to the construction of a substitute bridge, and has maintained and does maintain that the proper development of the navigation of Newark Bay and of its Port Newark Terminal requires the removal of all bridges at the point set forth in the complaint, but that it has no knowledge or information sufficient to form a belief as to the other
167 allegations contained in Paragraph VI of the complaint.

VI.

It admits the allegations contained in Paragraph IX of the complaint, except that it has no knowledge or information sufficient to form a belief as to the truth of the allegations therein contained with reference to applications to the Board of Commerce and Navigation for permits and the denial thereof.

168 VII.

It asks that the Court determine whether "by law" the said new bridge is "a purpresture and a public nuisance."

VIII.

Attached hereto are copies of communications, marked Exhibits E and F, sent to the Secretary of War by The Port of New York Authority. The Port of New York Authority has taken no other

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action than is contained in such communications, except as herein stated.

IX.

The Port of New York Authority has not authorized the construction of the said proposed new bridge of the said Central Railroad Company of New Jersey and has taken no action thereon except as hereinbefore stated. The engineers of the New York, New Jersey Port and Harbor Development Commission and of The Port of New York Authority, in studying the problem of the 170
port and in submitting the Comprehensive Plan, did not make the bridge route a part of any belt line system for the reason, first, that there was so great a density of traffic then and now passing over said bridge, both passenger and freight, that, in the opinion of said engineers, it would be undesirable to utilize said bridge as part of a belt line over which additional traffic could be carried; and, secondly, since the question of removing the said bridge or re-building the same or substituting a tunnel therefor had been under consideration for many years and the matter had not yet been finally disposed of, the engineers were of 171
opinion that the said bridge route should not be made a part of the belt line system. The Port of New York Authority on the 27th day of July, 1922, wrote the War Department the letter of which a copy is hereto annexed, marked Exhibit G. Except as in this paragraph expressly admitted, or as qualified, the defendant denies the allegations of Paragraph XIII.

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X.

The Port of New York Authority has no information sufficient to form a belief as to the truth of the allegations in Paragraphs XIV, XV and XVI of the complaint.

XI.

The Port of New York Authority is advised that the Secretary of War and the Chief of Engineers, on or about the 29th day of December, 1922, did, in writing, approve of the plans of the
173 said The Central Railroad Company of New Jersey for a new bridge across the south end of Newark Bay, replacing the existing bridge at that point. It has no knowledge or information sufficient to form a belief as to the other allegations contained in Paragraph XVII of the complaint.

XII.

The Port of New York Authority has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraphs XVIII and XIX of the complaint, except
174 that it is advised that the defendant, The Central Railroad Company of New Jersey, has already commenced the construction of the said new bridge.

WHEREFORE, The Port of New York Authority appears herein and prays this honorable Court to determine its legal duties in the premises and states its readiness and willingness to pass upon any application for a permit to build such bridge, if the Court shall determine that, under the acts of the Legislatures of the States of New York and

175

New Jersey and of the Congress of the United States, such permit is required.

JULIUS HENRY COHEN,
Counsel and Solicitor for Defendant,
The Port of New York Authority,
Office and Post Office Address,
111 Broadway, New York City.

EXHIBIT E.

September 8, 1922.

176

Hon. J. M. Wainwright,
Acting Secretary of War,
Washington, D. C.

Dear Sir:

In further acknowledgment of your communication of August 26th (E. D. 41789/242), I beg to advise you as follows:

The Port of New York Authority, after giving very careful consideration to your letter can not see its way clear to act in the capacity that you suggest. The proposed bridge is entirely within the State of New Jersey.

177

There is a State Board in New Jersey, known as the Board of Commerce and Navigation, which has full statutory powers, granted to it by the Legislature of New Jersey, to deal with questions such as the one at issue.

In our judgment, with which on further reflection we are sure you will concur, it would be unwise to create a conflict of authority between two State bodies, as might arise in this case if we followed your suggestion. In any event it could

178 hardly avoid the appearance of passing over a State body specially charged with the supervision of such matters within the State.

We appreciate greatly the confidence and compliment you imply in asking us to act in the manner described. We shall always be glad to be of service to the War Department in any way we consistently can. In this matter, we believe you will agree, it would be better for us not to act.

Very truly yours,

179 (sgd) J. SPENCER SMITH
Vice-Chairman

EXHIBIT F.

December 21st, 1922.

Hon. John W. Weeks,
Secretary of War,
Washington, D. C.

Dear Mr. Secretary:

In the matter of the Central Railroad of New Jersey bridge across Newark Bay, representa-
180 tives of some of the commercial organizations of this port, which are members of the Advisory Council, created under the Port Authority Statutes, called at our office to inquire what action the Port Authority took at the time Colonel H. C. Newcomer of the Board of Army Engineers was requesting opinions on this subject last summer.

We furnished those organizations copies of the letter. In the event that copy of our letter of July 27th to Col. Newcomer, in answer to his communication, may not have reached your office, I am enclosing herein a copy.

Answer of Defendant, The Port of New York Authority

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The Port Authority has taken no subsequent action in this matter.

I remain,

Yours very respectfully,

(sgd) E. H. OUTERBRIDGE
Chairman.

EHO rbh

EXHIBIT G.

July 27th, 1922. 182

War Department,
United States Engineer Office,
Second District,
Colonel H. C. Newcomer,
Room 616, Army Building, 39 Whitehall St.
New York, N. Y.

Dear Colonel Newcomer,

Replying to your circular letter of July 24th, in reference to the application and revised plans of the Central Railroad Company of New Jersey, for a bridge across Newark Bay; Mr. Drinker of our staff has this morning examined the plans in your office. 183

We understand the situation to be that Congress has granted authority for the construction of a new bridge and that the only question before you is the approval of the amended plans submitted by the Railroad Company.

In our opinion the change to 35′ above M. H. W. at closed position, as compared to 13.7′ as previously, will materially facilitate the passage of tugs and lighters without masts. We believe it

184 would be a still further improvement if the lifting spans could be set directly at right-angles to the channel rather than oblique thereto.

I cannot refrain from saying, however, that in our previous careful consideration of this matter we had thought that it would be preferable if no new bridge should be built at this time, or perhaps for a few years, for the following reasons:—

1. The ultimate character of the marine traffic in Newark Bay will be probably very accurately foreshadowed by developments within
185 the next two or three years. If it should be proved that large steamships and masted vessels in substantial numbers are to be operated from Newark Bay, a bridge even as called for in the amended plans might prove a very serious obstruction to navigation.

2. If a large capital expenditure is now made for a new bridge, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such a bridge, and might thus impose for a long time to come serious limitations upon otherwise possible marine de-
186 velopments and facilities.

3. If after a lapse of two or three years, marine traffic had not developed, of a character to be seriously obstructed by such a bridge, it could then be more safely undertaken.

4. We realize of course the necessity for the railroad to be provided with adequate and proper facilities for its passenger and freight service, but also apprehend that if important marine services developed in Newark Bay, passage for which must be freely and frequently

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permitted, the business of both the railroad and shipping may be seriously incommoded.

5. A large investment of capital by the railroad in a bridge could not be jeopardized or scrapped for a long time to come, probably its physical attributes and operation could not be materially altered. On the other hand, if there should occur a large development of shipping, it would have to be afforded frequent and free access to the ship terminals.

6. We held the view that a brief probationary period of two or three years would probably develop all these facts more clearly than they can be determined today, and therefor enable a wiser judgment as to what ultimate course would be best in the interest of passenger accommodation and trade and commerce.

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Yours very truly,

(sgd) E. H. OUTERBRIDGE
Chairman.

EHO rbh

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190 **Affidavit of William Leary, Read on Behalf of Appellee.**

UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

WILLIAM LEARY, being duly sworn, deposes and says:

1. That he is the Secretary of The Port of New York Authority and has been such ever since its creation under Chapter 154, Laws of New York, 1921, Chapter 151, Laws of New Jersey, 1921, and Public Resolution No. 17-67th Congress.

2. On the 27th day of July, 1922, pursuant to
192 resolutions duly adopted by the Commissioners of The Port of New York Authority, the Chairman addressed to Colonel H. C. Newcomer, United States engineer for the Second District, at his office, Army Building, 39 Whitehall Street, New York City, the letter of which Exhibit A, hereto annexed, is a true copy.

Affidavit of William Leary

3. Under date of August 26, 1922, the Commissioners of The Port of New York Authority received a communication from the War Department, a true copy of which is hereto annexed, marked Exhibit B. 193

4. Under date of September 8, 1922, pursuant to resolution duly adopted, the Commissioners of The Port of New York Authority sent to the Secretary of War a reply to the said communication of August 26, 1922, of which Exhibit C, hereto annexed, is a true copy.

5. On the 20th day of December, 1922, ~~the~~ Chairman was duly authorized to send a letter to the Secretary of War, enclosing a copy of the letter to Colonel H. C. Newcomer of July 27, 1922, Exhibit A, and stating that there was no change in the position of The Port of New York Authority regarding the Central Railroad of New Jersey bridge. That pursuant thereto, the Chairman sent, under date of December 21, 1922, to the Secretary of War a letter of which a copy is hereto annexed, marked Exhibit D. 194

6. I have searched the records of The Port of New York Authority and find that no other action or proceeding has been taken by that body since its organization, and I do so certify. 195

7. No application has at any time been made by The Central Railroad Company of New Jersey or anyone on its behalf for the consent or approval of The Port of New York Authority for the construction of the proposed bridge referred to in the complaint herein and The Port of New York authority has not given its consent or ap-

196 proval to the construction of the said proposed bridge.

WILLIAM LEARY.

Sworn to before me this 18th day of January, 1923.

[NOTARY SEAL] NOTARY EDWARD J. TSCHIMBKE, Notary Public, N. Y. Co. Clerk's No. 106, Reg. No. 4034; Kings Co. Clerk's No. 32, Reg. No. 4008; Bronx Co. Clerk's No. 6, Reg. No. 48; Queens Co. Clerk's No. 829; Richmond County Clerk, Westchester County Clerk and Register,
197 Albany County Clerk, Monroe County Clerk. My term expires March 30, 1924.

[Port of N. Y. Authority Seal.]

EXHIBIT A.

(Copy)

July 27th, 1922.

War Department,
198 United States Engineer Office,
Second District,
Colonel H. C. Newcomer
Room 616, Army Building, 39 Whitehall St.,
New York, N. Y.

Dear Colonel Newcomer:

Replying to your circular letter of July 24th in reference to the application and revised plans of the Central Railroad Company of New Jersey, for a bridge across Newark Bay; Mr. Drinker of our

staff has this morning examined the plans in your office. 199

We understand the situation to be that Congress has granted authority for the construction of a new bridge and that the only question before you is the approval of the amended plans submitted by the Railroad Company.

In our opinion the change to 35′ above M. H. W. at closed position, as compared to 13.7′ as previously, will materially facilitate the passage of tugs and lighters without masts. We believe it would be a still further improvement if the lifting spans could be set directly at right-angles to the channel rather than oblique thereto. 200

I cannot refrain from saying however, that in our previous careful consideration of this matter we had thought that it would be preferable if no new bridge should be built at this time, or perhaps for a few years, for the following reasons:—

1. The ultimate character of the marine traffic in Newark Bay will be probably very accurately foreshadowed by developments within the next two or three years. If it should be proved that large steamships and masted vessels in substantial numbers are to be operated from Newark Bay, a bridge even as called for in the amended plans might prove a very serious obstruction to navigation. 201

2. If a large capital expenditure is now made for a new bridge, it would tend to fasten upon Newark Bay perhaps for years the operating conditions entailed by such a bridge, and might thus impose for a long time to come serious limitations upon otherwise possible marine developments and facilities.

202 3. If after a lapse of two or three years, marine traffic had not developed, of a character to be seriously obstructed by such a bridge, it could then be more safely undertaken.

4. We realize of course the necessity for the railroad to be provided with adequate and proper facilities for its passenger and freight service, but also apprehend that if important marine services developed in Newark Bay, passage for which must be freely and frequently permitted, the business of both the railroad and shipping may be seriously in-
203 commoded.

5. A large investment of capital by the railroad in a bridge could not be jeopardized or scrapped for a long time to come, probably its physical attributes and operation could not be materially altered. On the other hand, if there should occur a large development of shipping, it would have to be afforded frequent and free access to the ship terminals.

6. We held the view that a brief probationary period of two or three years would probably develop all these facts more clearly than they
204 can be determined today, and therefor enable a wiser judgment as to what ultimate course would be best in the interest of passenger accommodation and trade and commerce.

Yours very truly,

(sgd) E. H. OUTERBRIDGE
Chairman.

Affidavit of William Leary

EXHIBIT B. 205

(Copy)

WAR DEPARTMENT.
Washington

August 26, 1922.

The Port of New York Authority,
11 Broadway,
New York City.

Sirs:

There is pending before this Department, the application of the Central Railroad of New Jersey, for authority to construct a new bridge across the southern portion of Newark Bay, to replace the present structure. There are also before this office, protests against the construction of any new bridge at this locality, and requests for the removal of the present structure as being unduly obstructive to navigation in and out of Newark Bay. A new bridge has been authorized by act of Congress, but there is also pending a bill to repeal the authorization for the new bridge. The Central Railroad of New Jersey is anxious to obtain prompt action upon its application because under the law authorizing the construction of the new bridge, work must be commenced by the 15th of February, 1923. 206 207

The opinions expressed on both sides of the question are quite strong and the interests involved are very large, both by water and by land. Although the port of New York is national in its importance and the proper development of the harbor is a matter in which the department of the government charged with harbor improvement must always be actively interested and over which it must exercise control, there are at times de-

208 tails concerning which it desires to know the wishes and preference of the majority of the interests affected, in the community. The continuance of the bridge owned by the Central Railroad of New Jersey will affect the movement of vessels to a certain extent. The removal of the bridge on the other hand, will affect the movement of passengers daily going to New York, and also require considerable adjustment of railroad facilities to meet the change in the freight situation. The costs involved are heavy, whichever way the matter is decided, and after a decision is once made it will be impracticable and inadvisable to
209 change for very many years if, indeed, any change is possible. Under these circumstances, it would appear that the Port of New York Authority, which has under its jurisdiction all the questions of the proper development of New York Harbor, should be the one authority most competent to reconcile, if possible, the conflicting interests, and give a recommendation which will be as nearly satisfactory as possible to all affected.

I therefore, ask the Port of New York Authority to thoroughly investigate this matter, giving full and careful consideration to all interests con-
210 cerned, and make recommendation to the Secretary of War whether the development of the harbor and business affected both by land and by water, will be better served by the construction of a new bridge or by the elimination of any bridge across this portion of the Bay. In submitting your final conclusion and recommendation, I would request that it be accompanied, as an appendix, by such arguments and data as you may have considered in reaching your decision.

Very respectfully,

(sgd) J. M. WAINWRIGHT
Acting Secretary of War.

Affidavit of William Leary

EXHIBIT C. 211

September 8, 1922.

Hon. J. M. Wainwright,
Acting Secretary of War,
Washington, D. C.

Dear Sir:

In further acknowledgement of your communication of August 26th (E. D. 41789/242), I beg to advise you as follows:

The Port of New York Authority, after giving very careful consideration to your letter cannot see its way clear to act in the capacity that you 212
suggest. The proposed bridge is entirely within the State of New Jersey.

There is a State Board in New Jersey, known as the Board of Commerce and Navigation, which has full statutory powers, granted to it by the Legislature of New Jersey, to deal with questions such as the one at issue.

In our judgment, with which on further reflection we are sure you will concur, it would be unwise to create a conflict of authority between two State bodies, as might arise in this case if we followed your suggestion. In any event it could hardly avoid the appearance of passing over a 213
State body specially charged with the supervision of such matters within the State.

We appreciate greatly the confidence and compliment you imply in asking us to act in the manner described. We shall always be glad to be of service to the War Department in any way we consistently can. In this matter, we believe you will agree, it would be better for us not to act.

Very truly yours,

(sgd) J. SPENCER SMITH
Vice-Chairman.

214 EXHIBIT D.

December 21st, 1922.

Hon John W. Weeks,
Secretary of War,
Washington, D. C.

Dear Mr. Secretary:

In the matter of the Central Railroad of New Jersey bridge across Newark Bay, representatives of some of the commercial organizations of this port, which are members of the Advisory Council, created under the Port Authority Statutes, called at our office to inquire what action
215 the Port Authority took at the time Colonel H. C. Newcomer of the Board of Army Engineers was requesting opinions on this subject last summer.

We furnished those organizations copies of the letter. In the event that copy of our letter of July 27th to Col. Newcomer, in answer to his communication, may not have reached your office, I am enclosing herein a copy.

The Port Authority has taken no subsequent action in this matter.

I remain,

216 Yours very respectfully,

(sgd.) EUGENIUS H. OUTERBRIDGE
Chairman.

EHO rbh

Petition and Notice of Motion for Intervention of the State of New Jersey. 217

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Petition—Notice.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 218
Defendants.

To Jerome T. Congleton, Esq., Solicitor for The City of Newark:

Sir:

PLEASE TAKE NOTICE, that on Wednesday, the twenty-fourth day of January, 1923, at 10:30 o'clock A. M., I shall apply to the Honorable Charles F. Lynch, Judge of the District Court of the United States in and for the District of New Jersey, in equity, for an order permitting 219
the State of New Jersey to intervene in the above entitled cause or be made a party defendant in the bill of complaint therein upon petition, a copy of which is hereto annexed.

Dated, January 19, 1923.

THOMAS F. Mc CRAN
Attorney General of the State
of New Jersey.

Petition for Intervention of the State of New Jersey

220

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Bill for Injunction.—Petition for Intervention on Behalf of the State of New Jersey.]

THE CITY OF NEWARK, *Complainant,*

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY AND THE PORT OF NEW YORK AUTHORITY,

221 *Defendants.*

The petition of the State of New Jersey, by Thomas F. McCran, its Attorney General, petitions and informs the Court that

1. By an Act of the Legislature of the State of New Jersey entitled "An Act to Create the New Jersey Harbor Commission and define its powers and duties", approved April 8, 1914, Chapter 123, a commission was created to be appointed by the Governor, to be known as "The New Jersey Harbor Commission." Section 4 of said Act provided,

222 among other things as follows:

> "All plans for the development of any water front upon any navigable water or stream of this state, or bounding thereon, which is contemplated by any person, corporation or municipality * * * which involves the construction, change, alteration or modification of a * * * bridge * * * shall first be submitted to the said Commission, and no such development or improvement enumerated within the provisions of this section, * * *

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shall be commenced or executed without the approval of this Commission first had and received.

* * * Any development or improvement * * * which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; * * *"

224 By an Act of the Legislature of the State of New Jersey entitled "An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all powers and duties now devolved, by law, upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," approved April 8, 1915, Chapter 242, a Department of Commerce and Navigation was established, the same to be governed by a board to be known as the Board of Commerce and Navigation, upon which Board was devolved the powers conferred by the Act of 1914 upon the New Jersey Harbor Commission.

225

2. That pursuant to the provisions of the aforesaid statutes, the said The Central Railroad Company of New Jersey on or about the 16th day of February, 1917, made an application to the said Board of Commerce and Navigation for the approval of plans submitted to said Board with said application for the construction of a bridge across the mouth of Newark Bay below the City of New-

226 ark in the County of Essex, between the City of Elizabeth in the County of Union and the City of Bayonne in the County of Hudson, State of New Jersey, to carry the main line of its railroad over Newark Bay. The said Board of Commerce and Navigation, after due consideration of said application, refused such approval on or about the 16th day of April 1917.

The Central Railroad Company of New Jersey thereafter and on or about the 12th day of June, 1918, made a new application to the said Board of
227 Commerce and Navigation for the approval of its said plans and for a permit to carry out the said work, which application, after due consideration thereof, was also refused on or about the 15th day of July, 1918.

The said Central Railroad Company of New Jersey, on or about the 2nd day of February, 1922, made a further application to the said Board of Commerce and Navigation for the approval of its plans and for a permit to carry out the construction of its said bridge, which application also, after due consideration thereof, was on or about the 19th day of June, 1922, refused; that the ap-
228 proval of the said Board of Commerce and Navigation of the plans for the construction of the said bridge has never been obtained.

3. That the said Central Railroad Company of New Jersey has not complied with the provisions of said Chapter 123 of the Laws of 1914 as amended by Chapter 242 of the Laws of 1915 of the State of New Jersey, in that it has not obtained the approval of its plans for the construction of said bridge, and that until it shall procure approval of its plans from the said Board

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of Commerce and Navigation and a permit therefor, any construction of said bridge or any development or improvement in connection therewith is declared by law to be a purpresture and a public nuisance.

4. Your petitioner further says that the defendant, the Central Railroad Company of New Jersey, has already commenced the construction of said new bridge under the pretended authority of a permit issued by the Secretary of War, but without having obtained the approval of its plans for such construction from the Board of Commerce and Navigation or a permit therefor as required by the statutes of the State of New Jersey aforesaid, without which such construction becomes by law a purpresture and a public nuisance.

230

5. That the State of New Jersey is interested in the subject matter of the cause in which this petition is filed, in that said cause is a suit to enjoin the construction of said bridge by the Central Railroad Company of New Jersey, among other grounds because of the failure of said Railroad Company to obtain approval of its plans for the construction of said bridge from the Board of Commerce and Navigation, an agent for the State of New Jersey, in that regard duly authorized and the permit of said Board authorizing said construction.

231

WHEREFORE petitioner prays:

1: That an order be made permitting petitioner to intervene in said cause either as complainant or defendant.

232

2: That writs of subpoena may issue, or an order be made directed to defendants, The Central Railroad Company of New Jersey and The Port of New York Authority, commanding them and each of them to answer, but not under oath, (oath being expressly waived) the allegations contained in this petition, and abide by and perform such orders and decrees as the Court may make in the premises.

3: That the Court adjudge the construction of said bridge without the approval of the plans
233 therefor and without the permission of the Board of Commerce and Navigation of the State of New Jersey to be unlawful and without authority.

4: That temporarily pending this suit, as well as permanently, the defendant, The Central Railroad Company of New Jersey, its officers, agents and servants, and its or their successors and assigns, be enjoined and restrained from proceeding with the construction of said bridge.

5: That this petitioner may have such other and further relief as may be meet and agreeable to equity.

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THOMAS F. McCRAN
Attorney General of the State
of New Jersey.
Solicitor of Petitioner.

Petition for Intervention of the State of New Jersey

235

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } ss.:

HARRISON P. LINDABURY, being duly sworn, deposes and says:

That he is the legal assistant of the Attorney General of the State of New Jersey, specially assigned as counsel to the Board of Commerce and Navigation, one of the agents of the State of New Jersey; that he has read the foregoing petition and is familiar with the contents thereof; that the matters and things therein set forth, so far as they relate to the acts and deeds of the State of New Jersey and the Board of Commerce and Navigation of New Jersey are true, and so far as they relate to the acts and deeds of others he believes them to be true.

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HARRISON P. LINDABURY.

Subscribed and sworn to before me,
this 19th day of January, 1923.

MAUD A. HORNER,
Notary Public of New Jersey.
My Commission Expires March 22, 1923.

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238 **Order Allowing State of New Jersey to Intervene.**

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Petition—Order Permitting the State of New Jersey to Intervene.]

THE CITY OF NEWARK,
Complainant,

vs.

239 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, and THE PORT OF NEW YORK AUTHORITY,
Defendants.

Application having been made by The State of New Jersey by its petition to be permitted to intervene in the above entitled cause on notice to the parties, and the Court having considered said application, it is thereupon, on this twenty-fourth day of January, Nineteen hundred and twenty-three,

240 ORDERED, that the said The State of New Jersey be and it hereby is permitted to intervene in said cause as a party complainant.

CHARLES F. LYNCH,
Judge.

Petition and Notice of Motion for Intervention of the City of Jersey City. 241

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity.]

CITY OF NEWARK, *Complainant*

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 242
Defendants.

To Central Railroad Company of New Jersey and the Port of New York Authority:

TAKE NOTICE that upon the petition hereto annexed I shall apply on the 24th day of January next at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, before the Honorable Charles F. Lynch, one of the Justices of the United States District Court for an order permitting the petitioner herein to be joined and 243
intervene as a party complainant in the above entitled cause.

AND TAKE FURTHER NOTICE that at the said time and place I shall present the original petition, a true copy of which is hereto annexed, as the basis for said application.

Dated, January 22, 1923.

THOMAS J. BROGAN,
Corporation Counsel.

Petition for Intervention of the City of Jersey City

244

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[Petition for Leave to Intervene.]

CITY OF NEWARK, *Complainant*,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

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To the Honorable Judges of the District Court of the United States for the District of New Jersey:

The Mayor and Aldermen of Jersey City, a municipal corporation of the State of New Jersey, by Thomas J. Brogan, its corporation counsel and solicitor, respectfully shows:

1. That the City of Newark has filed a bill of complaint in this honorable Court, together with
246 a notice of motion for an injunction *pendente lite* against the Central Railroad of New Jersey and the Port of New York Authority.

2. That the City of Jersey City desires to intervene as a complainant in said suit because of its ownership of certain lands fronting upon the Newark Bay and the Hackensack River, which lands and the development with respect thereto, already begun by your petitioner, will be greatly affected by the determination of the subject matter of this suit, and for that purpose adopts as

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its own the allegations of the bill of complaint hereinbefore filed by the City of Newark in the above entitled cause as if it were its own insofar as the allegations therein contained refer to or affect the development of the Newark Bay or the Hackensack River with respect to the location of the proposed bridge by the defendant the Central Railroad of New Jersey.

3. The City of Jersey City has within its territorial limits approximately six miles of shore land fronting upon the Newark Bay and the Hackensack River, said Hackensack River being 248
a continuation, as it were, of the Newark Bay.

4. The City of Jersey City owns in fee approximately 80 acres of said land and has already instructed its law officers to begin condemnation proceedings for the acquisition of additional land fronting on said waterways (Newark Bay and Hackensack River) in pursuance of a plan adopted by the City Commissioners of Jersey City and known as the "Jersey City Development Plan."

5. Your petitioner further shows that it has 249
spent large sums of money in the reclaiming of lands fronting on the Newark Bay, and in addition thereto has appropriated the sum of $650,000 for the erection and construction of wharves and bulkheads in and upon the lands owned by said City.

6. Your petitioner is informed and verily believes it to be true that the erection and construction of the proposed bridge across the mouth of the Newark Bay between the City of Bayonne,

250 in the County of Hudson and State of New Jersey, and the City of Elizabeth, in the County of Union and State of New Jersey, will work irreparable damage and injury to the lands fronting on the Newark Bay and Hackensack River and will result in almost a total waste of the moneys heretofore expended by your petitioner for the proposed development of the water front as laid down on the Jersey City Development Plan.

Your petitioner therefore prays that it may be allowed to intervene in and become a party
251 complainant in said action, and for such other relief in the premises as the nature of the circumstances may require and to this honorable Court shall seem meet and just.

THE MAYOR AND ALDERMEN OF JERSEY CITY.
By THOMAS J. BROGAN,
Corporation Counsel.

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Order Allowing City of Jersey City to Intervene. 253

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[In Equity—Order.]

CITY OF NEWARK,

Complainant,

vs.

CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, 254

Defendants.

Application having been made by the Mayor and Aldermen of Jersey City, by its petition, to be permitted to intervene in the above entitled cause and notice of the said application having been given to the defendants, and the court having considered said application, it is thereupon, on this 24th day of January, 1923,

ORDERED that the said Mayor and Aldermen of Jersey City be and it hereby is permitted to intervene in said cause as a party complainant. 255

CHARLES F. LYNCH,
Judge.

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Opinion.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY, THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and the PORT OF NEW YORK AUTHORITY,
257 *Defendants.*

ON MOTION OF COMPLAINANTS FOR INJUNCTION PENDENTE LITE AND COUNTER-MOTION OF DEFENDANT, CENTRAL RAILROAD COMPANY OF NEW JERSEY, TO DISMISS THE BILL OF COMPLAINT.

JEROME T. CONGLETON, Esq., Solicitor for Complainant City of Newark (GEORGE W. WICKERSHAM, Esq., of Counsel).

THOMAS J. BROGAN, Esq., Solicitor for the Mayor and Aldermen of Jersey City.

258 THOMAS F. MCCRAN, Esq., Attorney General, Solicitor for the State of New Jersey (HARRISON P. LINDABURY, Esq., of Counsel).

GEORGE HOLMES, Esq., and R. V. LINDABURY, Esq., Solicitros for and of Counsel with the Defendant, the Central Railroad Company of New Jersey.

JULIUS HENRY COHEN, Esq., Solicitor for Defendant, the Port of New York Authority.

Opinion

LYNCH, District Judge. 259

The complainants seek to restrain the defendant, the Central Railroad Company of New Jersey (hereinafter referred to as the Railroad Company), from erecting a steel and concrete bridge with bascule draws across the mouth of Newark Bay to take the place of a wooden bridge having bascule draws which the Railroad Company has maintained there for many years. The Railroad Company moves to dismiss the bill of complaint on the ground that it sets up no cause or causes of action. Considering the contents of the bill as admitted, the Court is called upon to deter- 260
mine whether in law a prima facie case is presented. If there is, restraint may issue. If there is not, the bill must be dismissed.

For many years the states, unhampered by Congress, authorized the construction of bridges over navigable waters lying entirely within their confines.

> "From an early date the State has been recognized as the source of authority *in the absence* of action by Congress." *Willson* v. *Black-Bird Creek Marsh Co.*, 2 Pet., 245, *Escanaba* v. *Chicago*, 107 U. S., 678.

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But it is conceded that such waters are subordinate and subject to the paramount right and authority of the United States under the Federal Constitution. It is for Congress to determine when it will exercise its power. Its mere silence or inaction when a corporation, under the authority of a State, places a structure across a navigable waterway, cannot have the effect of casting upon the Federal Government an obligation not to subsequently exert its constitutional power.

Opinion

262 The waters of Newark Bay at the bridge site are navigable and lie wholly within the State of New Jersey. The existing bridge of the Railroad Company was authorized, constructed and maintained solely by virtue of the authority of an Act of the Legislature of the State of New Jersey approved February 23, 1860, entitled "A Further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Eastern Railroad Company,' passed February 26, 1847."

In March, 1899 (many years after the bridge was built) Congress adopted what is known as
263 the "United States River and Harbor Act" (30 Stat., 1121), which provides that the *consent* of Congress must be obtained whenever it is planned to build bridges across navigable rivers. This, it is recognized, was an assertion by Congress of its dormant power, and the practice thereafter, upon obtaining authority to construct from the State, was to secure the consent of the Government, as required by this 1899 Act.

This practice continued until 1906 when Congress passed a law entitled "An Act to Regulate the Construction of Bridges Over Navigable Waters." This act, which is commonly known as
264 the "Bridge Act of 1906," provided that whenever *authority is granted by Congress to construct or maintain a bridge* across or over any of the navigable waters of the United States, a bridge shall not be built or commenced until the plans have been submitted to and approved by the Secretary of War; and further that any bridge built in accordance with the provisions of such act *shall be a lawful structure* and shall be recognized and known as a Post Route. In pursuance of this Act of 1906 the Railroad Company has secured the passage by Congress of an act entitled "An

Act to Authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey," approved August 8, 1919 (41 U. S. Stat., 277). 265

Did the Act of 1906 have the effect of extending Federal power (the dormant Federal power) so as to exclude all State control?

> "Where there is a conflict the State legislation must give way. Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority the regulating power of the State ceases to exist." *Erie Railroad Company* v. *New York,* 233 U. S., 671. 266

There is only one case that I am aware of in which the effect of the Bridge Act of 1906 has been considered and that is the case of *People* v. *Hudson River Connecting Railroad Corporation* (228 N. Y., 204), which was argued in the Court of Appeals of New York on December 9, 1919. The pertinent facts there were as follows: In *April, 1913,* the New York State Legislature granted the Connecting Railroad the right to construct, maintain and operate a bridge *with more than one span* over the Hudson River at a point 267 where its navigable waters were wholly within the State of New York. In March, 1914, in language identical with the language used in the instant case, Congress granted the Connecting Railroad authority to construct, maintain and operate a bridge and approaches across the Hudson at the same site according to the provisions of the Federal Bridge Act of March, 1906. In *May, 1917,* the plans were approved by the Secretary of War, as required by the Bridge Act. But in *June, 1917,*

268 the New York Legislature *repealed* its law of April, 1913, and passed a law authorizing a bridge *with but one span*—a different kind of a bridge than that authorized by Congress. There being a conflict between the Government and the State, the Court of last resort of the State, by a unanimous vote, decided that Congress in adopting the Bridge Act of 1906 exercised its plenary power and its action excluded any further or other action by the State. I quote from the opinion of Judge ELKUS:

> "What other or higher authority could be
> 269 given to construct a bridge than an Act of Congress stating in terms that such authority is granted? Grant having been made as required by the Bridge Act, the condition governing application of that act has been complied with, and Congress, under its authority over commerce, has declared the bridge to be erected over a navigable stream to be a lawful bridge. Certainly the state cannot make unlawful that which Congress, under its plenary power over interstate commerce, has declared to be lawful. (Cases cited.)
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> * * * * * * * *
>
> The plenary power of Congress under the
> 270 Constitution lies dormant until Congress sees fit to exercise it and in this twilight zone of suspended power the sovereign power of the state is supreme and rights vested during that period under state authority are not subsequently lost when Congress exercises its plenary power, although the entire authority of the state may be superseded as in the cases of bankruptcy and coinage.
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> * * * * * * * *
>
> Congress having declared the bridge proposed to be erected lawful and authorized the defendant to erect same, no authority remained in the state to make any new or other regulations or requirements."

The Attorney General of the State of New York 271
sought a review of this decision in the United States Supreme Court, but a writ of certiorari was denied.

Prior to the decision in the connecting case just referred to there was an allusion to the Bridge Act of 1906 in a decision of the United States Supreme Court in the case of *Union Bridge Company* v. *United States*, argued December 5 and 6, 1906. In that case Justice HARLAN, in reviewing legislation affecting the power of Congress over navigable waters said: "Finally we have the Act of March 23, 1906," but that is all he said about 272
it. An analysis of the Court's lengthy opinion discloses that a construction of this act was not necessary to a determination of the matter which was then before the Court.

The complainants call my attention to the case of *International Bridge Company* v. *New York*, argued in the United States Supreme Court on December 6, 1919, and reargued on October 11 and 12, 1920 (reviewing the Court of Appeals of New York). There was involved there the remodelling of an international bridge between New York and Canada. The international bridge had been authorized originally by the joint action of the State 273
of New York and the Dominion of Canada, with the approval of Congress, and the Supreme Court considered the right of Congress to authorize changes without the concurrence of New York. The original Act of Congress of 1870 mentioned the bridge as being built "in pursuance of" the New York statutes. The Court in considering the *Act of March 3, 1899*, held that that Act did not make Congress the source of the right to build but assumed that the right came from the State.

274 After critically examining all of the legislation which controlled that particular situation the Court stated that it could not discover any intent on the part of Congress to withdraw state control, but that on the contrary there was an assumption that that control (of the State) was to remain. The Act of 1906, the effect of which we are now considering, was not mentioned by Justice HOLMES, who spoke for the Court.

The International Bridge case was later distinguished from the Connecting Bridge case by Judge ELKUS in his opinion in the latter case,
275 *supra*. Referring to the international bridge case he observed that the United States granted nothing to the Bridge Company, but merely *consented* to "'any bridge * * * constructed across the Niagara River * * * in pursuance of the provisions of an act of the Legislature of the State of New York, etc.'"

So the only judicial construction of the Bridge Act of 1906 is contained in the pronouncement of the highest court of a State which unanimously decided that the State may be completely ignored when Congress authorizes a bridge under the authority of that Act; that when Congress so au-
276 thorizes a bridge it *asserts exclusive control* of the situation.

The Railroad Company in the instant case is in a far more advantageous position than was the railroad in the *People* v. *Connecting Railroad* case, *supra*. In the instant case, while the proposed bridge is, in a sense, to be "new," it is in reality but the modernizing of a structure which originally was duly authorized by the State of New Jersey and which has been in continuous use for approximately 60 years.

Opinion

Under the New Jersey Act of February 23, 1860, the Railroad Company was authorized to "construct a bridge." No particular kind of a bridge was specified. Maintaining its bridge under State authority, does it not, in the absence of restrictive or preventive action on the part of the State, possess the right to repair its bridge, or improve it, or, if deemed advisable, *replace it by a modern structure?* In the event of its destruction by fire or otherwise would the Railroad Company not have the right to rebuild it? 277

On this subject the case of *Western Union Telegraph Co.* v. *Polhemus,* 178 Fed., 904, is instructive. In that case the Circuit Court of Appeals for this Circuit was dealing with the planting of renewal *and additional telephone* poles on an admitted right of way in front of property without the consent of the owners thereof. The point decided was that an easement expands to the call of its full enjoyment. Although it was not a railroad improvement with which the Court was concerned, Judge BUFFINGTON, speaking for the Court, took occasion to refer to and approve cases considered by other courts where improvements on railroads were involved. The principle is the same. I quote from his opinion: 278 279

> "Indeed, at an early day, Chief Justice SHAW, in *Brainard* v. *Clapp,* 64 Mass., 6; 57 Am. Dec., 74, held that the easement acquired by a railroad was
>
> > 'an appropriation of the land to all the uses of the land for the road, necessary and incidental; * * * that the right and power of the company to use the lands within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards. And if, af-

280 ter they have commenced operations, it is found necessary,' etc., 'to make further use of the lands, for purposes incident to the safe and beneficial occupation of the road, by,' etc., 'they have the right to do so to the same extent as when the railroad was originally laid out and constructed. All the reasons of necessity, propriety and fitness which apply to the one case are equally applicable to the other.'

And, referring to the broader use of the easement, he says:

'The case of railroads may be regarded as standing on some what stronger grounds
281 in this respect for several reasons: Because railroads are extremely costly, and proprietors cannot in the outset make and complete all the works which they contemplate and intend to make; because these works are comparatively new, and improvements are constantly making in the structure and management of the works, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them.'

282

And this future exercise of easement rights seems to have been generally followed, and was recognized in this circuit in *Lake Shore & M. S. Ry. Co.* v. *New York, C. & St. L. Ry. Co.* (C. C.), 8 Fed., 858, by Judge McKennan, who, where one railroad sought to condemn in part the easement of another, said:

'At the points of the alleged conflict, no actual encroachment upon these rights can be sanctioned or allowed; and in measuring their extent there must be a liberal consideration of the future as well as the pres-

ent necessities of the complainant, touching the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its freight business.'" 283

And in *Western Union Telegraph Co.* v. *Pennsylvania R. R. Co.* (C. C.), 120 Fed., 366, affirmed 195 U. S., 594, 25 Sup. Ct., 150, 49 L. Ed., 362, wherein it is said:

'We deem the question therein mentioned as to the future needs of a railroad in fulfilling its chartered purpose, such as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way.'" 284

Nevertheless, the complainants insist that this "new" bridge cannot be built without the approval of the State Board of Commerce and Navigation and the Port of New York Authority. Has the State, by appropriate action, vested either of these bodies with any power or authority in the premises?

The statutes under which the Board of Commerce and Navigation functions require corporations planning development of water fronts on navigable waters of the State to first secure the approval of the State Board whenever such plans involve the construction, change, alteration or modification of a bridge. I think it is obvious that these statutes, passed many years after the Railroad Company placed its bridge over the bay, were not intended to vest in the State agency thereby created the right to say that a railroad company might not replace its bridge constructed under State authority. How can the replacement of a bridge along a railroad right of way possibly be 285

286 regarded as a plan for the development of water frontage?

And as to the Port Authority—a sort of semi-sovereignty created by the States of New York and New Jersey, with the approval of Congress. It is axiomatic that neither Congress nor the Legislature of a State can delegate its general powers. And the Port Authority, apparently directed by men of vision, has proceeded, so far as endeavoring to secure power is concerned, with commendable caution. In the present situation the Port Authority has not asserted itself in any way. It is
287 brought into court as a defendant and states that if it has any duties to perform in the premises it will gladly perform them. Newark Bay is in the district over which the Port Authority has been given some jurisdiction and the question arises: Has Congress and the State delegated to the Port Authority the power to deal with the Railroad Company's present bridge, or any replacement thereof?

The "Comprehensive Plan" of the Port Authority adopted with the approval of Congress and the New York and New Jersey Legislatures does not provide for the demolition of the Railroad's
288 present wooden bridge, nor for the demolition of the Brooklyn bridge, or the Williamsburg bridge, or the 59th Street bridge, or the Pennsylvania Railroad, Lackawanna Railroad, Erie Railroad or Hudson "Tube" Railroad bridges which cross the Hackensack and Passaic rivers, or so far as I can discover, the demolition of any existing structures now carrying interstate traffic over navigable waters lying in the territory allotted to the Port Authority. The district of the Port Authority runs as far north as Irvington on the Hudson,

New York, as far east as Long Beach, Long 289
Island, as far south as Atlantic Highlands and as far west as Summit, New Jersey. There are maintained at present in this district all sorts of bridges over navigable waters, not only railroad bridges but also bridges designed to accommodate other modes of vehicular traffic. An examination of the statutes under which the Port Authority operates discloses no present authority to do away with any of these structures.

While Congress and the interested State Legislatures are contributing their support to the improvement of transportation facilities by the Port 290
Authority, none of those bodies has, nor has the Port Authority itself, yet attempted to attack the existing rights of corporations operating structures originally authorized by law. The fact that the use of this bridge is not contemplated in the present comprehensive plan of the Port Authority does not mean that it cannot be included therein. There is nothing to prevent an alteration of the comprehensive plan. There is nothing to prevent its complete abandonment. By appropriate action the Railroad's bridge could be made a part of it. And the fact that it (this bridge) is not now a part of it does not mean that it is, or that a 291
new structure in its place would be, an unlawful structure.

That Congress has not attempted to divest itself of its jurisdiction over the situation may be gathered from a reading of the Public Resolutions of Congress referred to in the bill of complaint (42 U. S. Stat.), wherein it is provided "that nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over

292 the region which forms the subject of said agreement."

I am of the opinion that the Port Authority is not now possessed of authority to proceed against this lawful bridge, but if it were and should desire to take affirmative action, it would undoubtedly first avail itself of the following provisions of Article XIII of the compact creating it which provides that:

> "The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in Article X for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein."

293

294 As I indicated at the outset, this Court is called upon to decide legal questions only—questions which have no relation whatever to the policy or advisability of fastening a steel and concrete structure across the mouth of this bay where, according to the bill, it appears that commercial activity is likely to increase. In my opinion these legal questions all resolve themselves one way. If, as was decided in the *Connecting Railroad* case, *supra,* Congress in passing the Bridge Act of 1906 undertook the sole and exclusive control

of situations such as here, the complainants are 295
without a case. If, on the other hand, the Bridge Act of 1906 merely provided for the consent of Congress to a bridge duly authorized by a state, the complainants are likewise without a cause for action, for, as I have already pointed out, the railroad company has the unimpaired State authority to maintain its bridge at this crossing. It has the sanction of both the State and the Federal Government.

It is my conclusion that the complainants have presented no *prima facie* case and it therefore becomes my duty to dismiss the Bill of Complaint. 296

Final Decree Appealed From.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[On Bill, etc.]

THE CITY OF NEWARK, the MAYOR and ALDERMEN OF JERSEY CITY, THE STATE OF NEW JERSEY,
Complainants, 297

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants.

This cause came on to be heard on the motion of complainant, The City of Newark, for an injunction *pendente lite* to restrain the defendant, The Central Railroad Company of New Jersey,

298 from constructing the bridge described in the bill of complaint, the Mayor and Aldermen of Jersey City and the State of New Jersey, having been admitted as co-plaintiffs in the cause by order entered herein, united in the said motion, and the defendant, The Central Railroad Company of New Jersey, having moved to dismiss the bill of complaint as against it, and the cause having been fully argued by counsel, and thereupon, upon consideration thereof, it is

ORDERED, ADJUDGED AND DECREED that the motion of the defendant, The Central Railroad Company
299 of New Jersey, to dismiss the bill of complaint herein as against it for want of equity be and the same hereby is granted, and that the said bill of complaint be and the same hereby is dismissed as against the defendant, The Central Railroad Company of New Jersey, for the cause aforesaid, and it is further

ORDERED, that the motion for an injunction be and the same is hereby denied for want of equity in the said bill of complaint, and it is further

ORDERED, that the said defendant, The Central Railroad Company of New Jersey, recover its
300 costs to be taxed.

Dated February 23rd, 1923.

CHARLES F. LYNCH,
U. S. D. J.

Petition for Appeal and Notation of Allowance. 301

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY and THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY, and THE PORT OF NEW YORK AUTHORITY, 302
Defendants.

To the Honorable the Judges of Said Court:

Now come the above named complainants, by their respective solicitors, and feeling themselves severally aggrieved by the final decree of this Court, entered on the 23d day of February, 1923, hereby pray that an appeal be allowed to them from the said decree to the Circuit Court of Appeals for the Third Circuit and in connection with this petition petitioners herewith present their assignment of errors. 303

JEROME T. CONGLETON,
Solicitor for Complainant The City of Newark.

THOMAS J. BROGAN,
Solicitor for Complainant The Mayor and Aldermen of Jersey City.

H. P. LINDABURY,
Special Counsel for Attorney-General Solicitor for Complainant, The State of New Jersey.

Appeal allowed.

(Signed) CHARLES F. LYNCH,
District Judge.

304 **Assignment of Errors.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

THE CITY OF NEWARK, THE MAYOR AND ALDERMEN OF JERSEY CITY, and THE STATE OF NEW JERSEY,
Complainants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
305 *Defendants.*

Now come the complainants, The City of Newark, The Mayor and Aldermen of Jersey City and The State of New Jersey, by their several solicitors, and in connection with their petition for appeal say that in the record, proceedings and in the final decree aforesaid manifest error has intervened to the prejudice of the complainants, to-wit:

306 (1) That the Court erred in denying the motions of the complainants for an injunction restraining the defendant The Central Railroad Company of New Jersey from erecting a bridge across the mouth of Newark Bay as described in the Bill of Complaint herein.

(2) That the Court erred in holding that the defendant The Central Railroad Company of New Jersey was authorized to construct the bridge described in the bill of complaint without the approval of the State Board of Commerce and Navigation of the State of New Jersey.

(3) That the Court erred in holding that the defendant The Central Railroad Company of New Jersey is authorized to construct the said proposed bridge without the approval of the Port of New York Authority. 307

(4) That the Court erred in holding that the complainants had presented no *prima facie* case, and therefore, that the bill should be dismissed.

(5) That the final decree entered as aforesaid is contrary to law.

WHEREFORE, complainants severally pray that the final decree of the District Court of the United States for the District of New Jersey dismissing the bill of complaint for want of equity be reversed, and that the order denying the motion of complainants for an injunction *pendente lite* be reversed, and that the cause may be remitted to the District Court with instructions to reinstate the bill and grant the injunction *pendente lite* as prayed by the complainants, respectively. 308

JEROME T. CONGLETON,
Solicitor for Complainant The City of Newark.

THOMAS J. BROGAN, 309
Solicitor for Complainant The Mayor and Aldermen of Jersey City.

H. P. LINDABURY,
Special Counsel for Attorney-General, Solicitor for Complainant, The State of New Jersey.

Stipulation Re Appeal Record.

310 UNITED STATES DISTRICT COURT,
DISTRICT OF NEW JERSEY.
[No. 4033—In Equity.]

THE CITY OF NEWARK,
Complainant-Appellant,

THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Intervenors-Appellants,
against

311 THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants-Appellees.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the United States District Court, District of New Jersey, in the above-entitled matter, as agreed upon by the parties.

Dated, April 17, 1923.

JEROME T. CONGLETON,
Solicitor for The City of Newark, Complainant-Appellant.

312 THOMAS F. McCRAN,
Attorney General, Solicitor for The State of New Jersey, Intervenor-Appellant.

THOMAS J. BROGAN,
Solicitor for The City of Jersey City, Intervernor-Appellant.

GEORGE HOLMES,
Solicitor for The Central Railroad Company of New Jersey, Defendant-Appellee.

JULIUS HENRY COHEN,
Solicitor for The Port of New York Authority, Defendant-Appellee.

Clerk's Certificate.

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UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

[No. 4033—In Equity.]

THE CITY OF NEWARK,
Complainant-Appellant,

THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Intervenors-Appellants,

314

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Defendants-Appellees.

I, GEORGE T. CRANMER, Clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the foregoing printed record is the transcript of the record of said District Court in the above-entitled matter, as agreed upon by the parties.

315

IN TESTIMONY WHEREOF I have caused the seal of said Court to be hereunto affixed in the City of Newark this 17th day of April, in the year of our Lord, the One thousand nine hundred and twenty-third, and of the Independence of the United States the One hundred and forty-seventh.

GEORGE T. CRANMER,
Clerk.

By CHARLES S. CHEVRIER,
Deputy.

[SEAL OF THE DISTRICT COURT]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ARGUMENT AND SUBMISSION

And afterwards, to wit, on the second day of October, 1923, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley, and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

OPINION—Filed February 29, 1924

DAVIS, Circuit Judge:

This is an appeal from a decree of the District Court denying a preliminary injunction and dismissing the bill filed by the City of Newark. The City of Jersey City and the State of New Jersey intervened as parties complainant. The object of the bill was to restrain the Central Railroad Company of New Jersey from building a draw-bridge across the mouth of Newark Bay below the City of Newark, between the City of Elizabeth in Union County and the City of Bayonne, in Hudson County, New Jersey, to replace a draw-bridge constructed at about the same location shortly after 1860, and since then maintained by that Company, pursuant to an act of the legislature of New Jersey approved February 23, 1860 (P. L. 1860 C. 64). This Act authorized the construction of a bridge "with a pivot draw with two openings, each of seventy five feet in width, at right angles to the main channel."

By an Act of the Legislature of New Jersey approved April 8, 1914, (P. L. 1914 Ch. 12 3) a Harbor Commission was created which provided in section 4 that all plans involving the construction, change, alteration or modification of any bridge over any navigable water or stream of that State would first be submitted to the Harbor Commission and that no such work should be commenced or executed without its approval and any work commenced without its approval was declared to be a purpresture and public nuisance.

The States of New York and New Jersey by agreement created thereafter, in 1921, a district known as the Port of New York District, which embraces among other places all the waters of Newark Bay, including the location of the proposed new bridge. It also

created a joint commission known as the Port of New York authority. This body consists of three commissioners from each State and is a nominal defendant. It has adopted "a comprehensive plan for the development of the Port of New York". This plan includes Newark Bay over which the bridge is to cross, but the bridge does not appear upon this plan. The Port Authority filed an answer in which it asked the Court to "determine whether 'by law' the said new bridge is 'a purpresture and a public nuisance'". Not being convinced of its legal duties it appeared in effect as amicus curiæ and prayed the Court to "determine its legal duties in the premises".

By virtue of an Act of the Legislature of New Jersey approved April 8, 1915 (P. L. 1915, Ch. 242), the duties of the Harbor Commission devolved upon the Board of Commerce and Navigation. Three times, February 16, 1917, June 12, 1918 and February 2, 1922, the Railroad Company applied to the Board of Commerce and navigation for approval to construct the proposed bridge across Newark Bay but the Board denied the applications.

The defendant company secured the passage by Congress on August 8, 1919, (41 Stat. 277) of an Act giving it authority to construct, maintain and operate the proposed draw-bridge in accordance with an Act of Congress entitled "An Act to regulate the construction of bridges over navigable waters", approved March 23, 1906 (34 Statute 84). This is the general bridge act under the authority of which all bridges have since its passage been built. Subsequent acts authorize the construction of particular bridges in accordance with the general provisions of this Act which requires any bridge built pursuant to its authority to be commenced within one year and completed within three years from the date of the approval of the act authorizing the construction. The bridge in question was not commenced within one year and so the authority given to the defendant company expired and became null and void on August 8, 1920. The defendant secured the passage by Congress of another Act, approved February 15, 1921, extending the times for commencing and completing the construction of the bridge, authorized by the Act of Congress approved August 8, 1919, two and five years respectively from the date of the approval of the Act.

The Act of March 23, 1906, supra, further provides that when authority is granted by Congress to construct and maintain a bridge across any navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings and map of the proposed construction, and location as may be required for a full understanding of the subject, have been submitted to and approved by the Secretary of War and Chief of Engineers. The defendant submitted the required plans and specifications, drawings and may to the Secretary of War and Chief of Engineers and secured their approval. It has commenced the construction of the bridge in accordance with these plans.

The City of Newark alleges that it owns certain real estate and riparian rights appurtenant thereto located on the Westerly side of

Newark Bay which is a navigable tidal body of water lying wholly within the State of New Jersey; that the City is engaged in improving this real estate for transportation, shipping and other industrial purposes; that the bridge maintained for many years at the locus in quo by the defendant has been, and the proposed new bridge will be, a serious obstruction to the navigation of Newark Bay by ocean-going steamers and sailing crafts and that the proposed new bridge is obstructive of and inimical to the comprehensive development planned by the States of New York and New Jersey in the Port of New York District. The City of Jersey City avers that it owns lands above the bridge on Newark Bay and the Hackensack River and joins in the allegations of the City of Newark. The State of New Jersey alleges that the defendant has not obtained the approval of the State Board of Commerce and Navigation. They contend that since the approval of this Board was not obtained by defendant, the proposed bridge will constitute a purpresture and public nuisance and that the action of the secretary of War and Chief of Engineers in approving the bridge is arbitrary and void because the Act of Congress, authorizing the construction of the bridge without the approval of the State of New Jersey, violates the rights guaranteed to complainants by the Fifth and Tenth Amendments to the Federal Constitution.

The amendments invoked declare that no person shall "be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation, and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people."

The complainants contend that these Amendments require that the concurrent consent of both State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound? The decision of this case depends upon the answer to this question. The State of New Jersey refused to give its consent and if that consent is necessary before the bridge may be lawfully built the will of the State, and not that of the Federal Government, is supreme.

It has many times been declared by the Supreme Court that when Congress enters the field of regulation and speaks, state regulation is excluded because of the paramount authority of Congress, provided it has spoken on a subject over which it has jurisdiction. The Constitution provides that, "The Congress shall have power, to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." It is thus seen that power to regulate commerce among the several States is expressly delegated to the United States by the Constitution in the most general and absolute terms. This power extends to the regulation of commerce on both land and water, to the control of the navigable waters of the country and the lands under them and to the erection of piers, bridges and all other instrumentalities of commerce which,

in the judgment of Congress, may be necessary or expedient for the exercise of this power. Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U. S. 421; Erie Railroad Company v. New York, 233 U. S. 671. This power is unrestricted except by constitutional limitations. Scranton v. Wheeler, 179 U. S. 141; Philadelphia Company v. Stimson, Secretary of War, 223 U. S. 605. If it "regulates commerce with foreign nations, and among the several states, and with the Indian Tribes," the power of Congress is supreme and is not rendered impotent by anything that a State may or can do. Economy Light Co. v. United States, 256 U. S. 113, 121. It is admitted that this bridge is to serve interstate commerce and Newark Bay is navigable. The regulation of commerce is the object of the Constitutional care and the source of Congressional power to regulate navigation and navigable streams. Stockton, Attorney General of New Jersey v. Baltimore & N. Y. R. Co., 32 Fed. 9. Whether the waters are wholly within the boundaries of one State or lie between or extend into two States is immaterial. Decker v. Baltimore & N. Y. R. Co., 30 Fed. 723.

From an early date it has been recognized that a State has power to authorize the construction of a bridge over navigable waters within its borders. Wilson v. Black-Bird Creek Marsh Co., 27 U. S. 244. Escanaba Company v. Chicago, 107 U. S. 678. Until the dominant power given by the Constitution is exercised by appropriate legislation, the power of the States is plenary. But when the power of the State and Federal Government come in conflict, the latter must control and the former yield. Escanaba Company v. Chicago, supra. Congress may or may not, just as it chooses, exercise its power over navigable streams.

The case of International Bridge Co. v. New York, 254 U. S. 126 is largely relied upon by appellants. But in that case, the United States had not exercised the power of eminent domain. The bridge between Squaw Island in the Niagara River and the mainland of the State of New York was built "in pursuance of the statutes of the State of New York." State authority, therefore, was the source of the Company's power. The Court said: "When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain." Congress in that particular case did not choose to exercise the power of exclusive control but left it to the State. And so the court left the power of control just where Congress left it. But that Congress does not have absolute, exclusive control, when it chooses to exercise it, is a very different proposition. If the consent of a State were necessary before a bridge could be built over navigable waters within its borders, the power of regulating commerce among the States and with foreign nations would reside in the States and not in Congress. In the case at bar, Congress has authorized the Construction of the bridge notwithstanding the opposition of the State of New Jersey. Its power to do this was plenary and may not be inter-

fered with by that State. Williamette Bridge Co. v. Hatch, 125 U. S. 1, 12; Prigg v. Commonwealth of Pennsylvania, 41 U. S. 539, Luxten v. North River Bridge Co. 153 U. S. 525; Southern Railway Co. v. Railroad Commission of Indiana, 236 U. S. 439; Economy Light Co. v. United States, 265 U. S. 113, 121; People v. Hudson River Railroad Corporation 228 N. Y. 203, 254 U. S. 631.

The cases relied on and cited by complainants do not establish a contrary doctrine. In the case of Louisville & Nashville Railroad Company v. Kentucky, 161 U. S. 677, counsel quotes part of the opinion on page 702, to the effect that the power of Congress over interstate commerce did not take from the States the power of legislation with respect to the instruments of such commerce. From this statement it is argued that the consent of New Jersey is necessary before the bridge may be legally constructed. But the court in speaking of the power of Congress, described it as the "dominant power of Congress" and a little further on in the same paragraph from which counsel quoted says: "In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith." Congress has always reserved to itself the superior and exclusive right to regulate commerce among the several States and every time that the Supreme Court has squarely met the question, it was in no uncertain language declared that the power of Congress to regulate the construction of bridges over navigable waters of the United States is dominant. When, therefore, Congress acted in the instant case, its powers was plenary, supreme and exclusive.

The decree of the District Court is affirmed.

[File endorsement omitted.]

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

Appeal from the District Court of the United States for the District of New Jersey

JUDGMENT—Filed February 29, 1924

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, February 29, 1924.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR APPEAL and ORDER ALLOWING SAME—Filed March 28, 1924

To the Honorable the United States Circuit Court of Appeals for the Third Circuit:

And now come The City of Newark, The City of Jersey City, and The State of New Jersey, by Jerome T. Congleton, Thomas J. Brogan and Henry J. Gaede, their respective solicitors, and conceiving themselves aggrieved by the final decree of this Court made and entered in the above entitled cause the 29th day of February, 1924, pray that an appeal therefrom may be allowed them to the Supreme Court of the United States for the reasons specified in their Assignment of Errors presented herewith; and the appellants aforesaid pray that the transcript of record of the proceedings herein upon which the said final decree of February 29, 1924, was made, together with the said decree and the opinion of the court, may be duly authenticated and sent to the said Supreme Court of the United States.

And the appellants aforesaid pray that a cash deposit of Two hundred and fifty dollars ($250) may be deemed sufficient to act as a supersedeas herein, no funds or other property of the appellees being now in the possession of the appellants so as to require the protection of a bond and no party hereto being now held under injunction.

And the appellants show that they are entitled to this appeal under Section 241 of the Act of Congress of March 3, 1911, as amended, known as the Judicial Code for that the decree of this court aforesaid is not made final by the provisions of Section 128 of the Act aforesaid.

And appellants further pray that the mandate to issue herein on the aforesaid order of February 29, 1924, be stayed until the further order of this court.

Dated, Newark, New Jersey, March 27, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney General, Solicitor for Appellant The State of New Jersey. George W. Wickersham, of Counsel.

The appeal herein prayed in the above stated cause is hereby allowed and the payment into court of cash money in lieu of a bond is approved.

J. Warren Davis, Circuit Judge.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 28, 1924

And now come the appellants The City of Newark, The City of Jersey City, and The State of New Jersey, and in connection with their petition for appeal say that in the record of proceedings herein and in the final decree herein made and entered the 29th day of February, 1924, manifest error hath intervened to the prejudice of the appellants, to-wit:

1. The court erred in denying the motions of the appellants for an injunction restraining the defendant, The Central Railroad Company of New Jersey, from erecting a bridge across the mouth of Newark Bay, as described in the bill of complaint herein.

2. The court erred in holding that the defendant, The Central Railroad Company of New Jersey, was authorized to construct the bridge described in the bill of complaint without the approval of the State of New Jersey.

3. That the court erred in holding that the defendant, The Central Railroad Company of New Jersey, was authorized to construct the bridge described in the bill of complaint without the approval of the State Board of Commerce and Navigation of the State of New Jersey.

4. The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority.

5. The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one state, and to render the authorization thereof by such state unnecessary.

6. The court erred in holding that there had been an exercise of the power of eminent domain by the United States in connection with the bridge described in the Bill of Complaint.

7. The court erred in refusing to hold that the concurrent assent of both the state and the federal government is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.

8. The court erred in refusing to hold that the source of power to construct a bridge over navigable waters wholly within the confines of one state is in the state itself.

9. The court erred in holding that the defendant Railroad Company's motion to dismiss was properly granted.

10. The court erred in affirming the order of the United States District Court for the District of New Jersey appealed from.

11. The final decree entered February 29, 1924, is contrary to law.

Dated, Newark, New Jersey, March 27, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney-General, Solicitor for Appellant The State of New Jersey. George W. Wickersham, of Counsel.

[File endorsement omitted.]

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

DESIGNATION OF RECORD—Filed March 28, 1924

The Clerk will please prepare a transcript of record herein to consist of the following:

1. The transcript of record herein on appeal from the final decree of the United States District Court for the District of New Jersey, dated February 23, 1923, to the United States Circuit Court of Appeals for the Third Circuit.

2. The minute entry as to argument.

3. The opinion of the United States Circuit Court of Appeals for the Third Circuit herein, per Hon. J. Warren Davis, United States Circuit Judge.

4. The final decree herein of the United States Circuit Court of Appeals for the Third Circuit made and entered the 29th day of February, 1924.

5. The petition for appeal to the Supreme Court of the United States.

6. The assignment of errors accompanying the foregoing petition for appeal.

7. The order allowing appeal and approving deposit in lieu of bond.

8. Citation on appeal.

9. This designation of record.

Dated, Newark, New Jersey, March 28, 1924.

Jerome T. Congleton, Solicitor for Appellant The City of Newark. Thomas J. Brogan, Solicitor for Appellant The Mayor and Aldermen of Jersey City. Henry J. Gaede, Special Counsel for Attorney-General, Solicitor for Appellant The State of New Jersey.

[File endorsement omitted.]

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

CLERK'S CERTIFICATE

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original record and proceedings in this Court in the case of: City of Newark, et al., Appellants, vs. Central Railroad of N. J., et al., Appellees, No. 2998, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 31st day of March in the year of our Lord one thousand nine hundred and twenty-four and of the Independence of the United States the one hundred and forty-eighth.

Saunders Lewis, Jr., Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal of United States Circuit Court of Appeals, Third Circuit.)

Citation in usual form showing service on J. H. Cohen & George Holmes omitted in printing.

[File endorsement omitted.]

Endorsed on cover: File No. 30,243. U. S. Circuit Court of Appeals, Third Circuit. Term No. 933. The City of Newark, The City of Jersey City, and The State of New Jersey, appellants, vs. The Central Railroad Company of New Jersey and the Port of New York Authority. Filed April 3rd, 1924. File No. 30,243.

MAPS
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IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Appellants,
against
THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

October Term, 1924
No. 351

APPELLANTS' BRIEF.

Statement.

This is an appeal from a final decree of the United States Circuit Court of Appeals for the Third Circuit* (Rec., p. 110) affirming the dismissal for want of equity of a bill (Rec., pp. 8-27) brought by the City of Newark—the prayer of the bill being joined in by certain intervening complainants, the State of New Jersey and the City of Jersey City (Rec., pp. 74 *et seq.* and 82 *et seq.*)—to enjoin the construction of a proposed bridge across Newark Bay, a navigable estuary *wholly within the State of New Jersey*, the State's assent to the bridge not having been secured. The complainant specially set up and claimed a threatened violation of its constitutional rights. Other grounds of federal jurisdiction are found in the provisions of the Act of Congress of March 23, 1906, Section 5 (34 Stat., 84, 86; printed in the Appendix, *post*, p. 102).

*Opinion reported in 297 Fed., 77.

The motion for a preliminary injunction was made on the bill of complaint and five supporting affidavits (Rec., pp. 27-48).

The Bill of Complaint alleges (Rec., p. 9) that complainant, the City of Newark, is the owner of a large tract of land on the west shore of Newark Bay. Upon this land it has, by the authority of State statutes (Rec., p. 10), developed a large terminal, known as the Port Newark Terminal, upon which it has expended about $6,500,000 (Rec., p. 10). The nature and scope of the development are fully described in the affidavit of Thomas L. Raymond in support of the motion for a preliminary injunction (Rec., pp. 42-48). Attached to his affidavit is a map (Exhibit A; Rec., p. 49) showing the location of Port Newark Terminal on Newark Bay, and an aerial photograph (Exhibit B; Rec., p. 51) showing the terminal and its general relation to New York Harbor.

The defendant railroad now reaches New York Bay by two different routes from Elizabeth, New Jersey. One of these routes is a line running north along the west shore of Newark Bay and crossing the mouths of the Passaic and Hackensack Rivers by bridges to Communipaw (Complaint, Rec., pp. 21-22); Staniford, Rec., p. 30). The other line runs from Elizabeth, New Jersey, by a bridge across Newark Bay to Bayonne, New Jersey, and thence north through Bayonne to Communipaw. The threatened supplanting of this bridge by a new one of a wholly different design, without the permission of the State, is the act which the complainant seeks to enjoin. The bridge by which the latter line crosses Newark Bay was constructed by the railroad pursuant to an Act of the New Jersey Legislature approved February 23, 1860 (Pamph. L., 1860, c. 64). This Act, which is reprinted in the Appendix, *post*, pp. 95 and 96, authorized the construction of a bridge "with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel."

The present Newark Bay bridge of the defendant railroad is a double-track wooden bridge with bascule draws, built at an angle of 66° to the main channel (Rec., pp. 10-11).

For some years past the defendant railroad has been seeking authority to construct a substitute bridge of masonry and steel, with four tracks and vertical draws, upon substantially the same location as the present bridge (Rec., p. 11). In its efforts to secure this authority, the railroad company procured the passage of an Act of Congress, approved August 8, 1919 (41 Stat., 277), and of a further Act approved February 15, 1921 (41 Stat., 1099), which Acts purported to grant federal sanction to the construction, maintenance and operation by the defendant railroad of a bridge and approaches thereto across Newark Bay at a point suitable to the interests of navigation between Elizabeth, New Jersey, and Bayonne, New Jersey (Rec., pp. 11-12), in accordance with the provisions of the Bridge Act of 1906 (34 Stat., 84). These statutes are printed in full in the Appendix, *post*, pp. 107 and 108.

The Railroad's unsuccessful attempts to secure the State's consent to the proposed bridge.

By an Act of the New Jersey Legislature approved April 8, 1914 (Pamph. L., 1914, c. 123; Appendix, *post*, pp. 104-105), the New Jersey Harbor Commission had been created and it had been provided in Section 4 of this act, among other things, that all plans involving the construction, change, alteration or modification of any bridge should be first submitted to the Commission, and that no such work should be commenced or executed without the Commission's approval. This Act also declared any work so commenced without such approval to be a purpresture and a public nuisance. By an Act of

the New Jersey Legislature, approved April 8, 1915 (Pamph. L., 1915, c. 242; Appendix, *post*, p. 106), the duties of the New Jersey Harbor Commission were devolved upon the Board of Commerce and Navigation.

Defendant-appellee, The Central Railroad Company of New Jersey, both before and after the passage of the acts of Congress of 1919 and 1921, applied, pursuant to the New Jersey laws, to the Board of Commerce and Navigation and submitted to it the plans of its proposed new bridge for approval. These applications were made on February 16, 1917, June 12, 1918, and February 2, 1922. All of these applications were denied, and the proposed new bridge has not the approval of the Board of Commerce and Navigation of the State of New Jersey (Complaint, Rec., pp. 15-16; Gelineau, Rec., pp. 41-42), nor of any other body acting for the State.

The Port of New York Authority.

The defendant, The Port of New York Authority, was created as a result of a compact between the States of New York and New Jersey, authorized by Chapter 154 of the New York Laws of 1921 and Chapter 151 of the New Jersey Laws of 1921. This body consists of six Commissioners, three of whom are chosen by each of the States. The compact was ratified by a joint resolution of Congress approved August 23, 1921 (42 Stat., 174). The compact provided that the Port Authority should, as soon thereafter as possible, adopt a comprehensive plan for the development of the Port of New York. This plan was thereafter agreed upon and approved by the States by Chapter 43 of the New York Laws of 1922 and Chapter 9 of the New Jersey Laws of 1922. By a joint resolution of Congress, approved July 1, 1922 (42 Stat., 822) the authority was granted by Congress to the Port Authority to carry out and

effectuate the comprehensive plan. The plan provided for the construction of various tunnels, bridges and belt-lines (Rec., pp. 16-18).

The proposed bridge of The Central Railroad Company of New Jersey is not shown on the plan authorized to be effectuated by the Resolution of Congress, and is alleged in the bill (Rec., p. 20), and admitted by the motion to dismiss, to be *"in conflict therewith, obstructive thereof and inimical thereto."* The Port Authority has not authorized the proposed bridge and has excluded it from the comprehensive plan for the reason, as alleged in the bill (Rec., p. 21), that such a bridge would constitute an obstacle to the proper development of the Port of New York. See in this connection the answer of the defendant-appellee, The Port of New York Authority, (Rec., p. 57).

The bill further alleges that the construction of the proposed new bridge would be, under the laws of the State of New Jersey, an unlawful purpresture, and further that it would constitute an insuperable obstacle to the proper carrying out of the comprehensive plan for the development of the New York Port District, thereby contravening the purposes of the joint resolution of Congress (Rec., p. 22).

Damaging consequences of a bridge at the point proposed.

The bill further alleges that the construction of the bridge would seriously interfere with the development of the Port Newark Terminal, upon the further development of which is dependent the receipt by the complainant of any adequate return upon its investment, and that the complainant has been unable to secure tenants for its properties at Port Newark Terminal because of the threatened construction of the proposed

bridge (Rec., p. 23). The difficulties which would be imposed upon navigation by the construction of the proposed bridge are described in the affidavits of Henry R. Lewis and F. J. Stillwaggon (Rec., pp. 33-40) in support of the motion. A drawbridge at the point in question makes necessary the use of tugs at large expense (Rec., p. 35), and even under the most favorable circumstances the entry into Newark Bay through any bridge at its mouth is hazardous. The proposed bridge, the fixed portions of which are to have a clearance of 35 feet, will have to be opened for all steam lighters and practically all barges (Stillwaggon, Rec., pp. 39-40), and for seventy-five per cent. of the lighters now operated in connection with the vessels of the Transmarine Corporation, a tenant of Port Newark Terminal (Lewis, Rec., p. 37). The present bridge is equipped with a type of draw which when opened imposes no limit upon the height of vessels passing through it (Stillwaggon, Rec., p. 38). The proposed bridge which is to have a vertical lift draw with a clearance of 135 feet when opened, will permanently exclude all vessels the height of whose masts exceed 135 feet. Many of the ocean-going cargo vessels entering New York Bay are of such a type (Stillwaggon, Rec., p. 39).

The bill also alleges that on December 29, 1922—after the New Jersey Board of Commerce and Navigation had refused to authorize the bridge—the Secretary of War and the Chief of Engineers approved the plans of the Railroad Company for a new bridge at the point in question, but that such action was arbitrary and void, and that the acts upon which the Secretary of War and the Chief of Engineers purported to rely violate complainant's rights under the Fifth Amendment of the Constitution of the United States and are in violation of the Tenth Amendment (Rec., p. 23).

It is alleged that if any bridge is constructed between the cities of Bayonne and Elizabeth, the free and unobstructed access of river and ocean-going vessels to Port Newark Terminal will be prevented, and the value of its terminal to complainant destroyed (Rec., p. 24).

The bill further alleges (Rec., p. 24) that the construction of the new bridge has already commenced and that the complainant will suffer irreparable injury if it is continued.

The alternatives available to the Central Railroad Company of New Jersey are set forth in detail in the affidavit of Charles W. Staniford (Rec., pp. 30-32). They are, broadly speaking, a re-routing of the railroad over its present line across the Passaic and Hackensack Rivers, or a tunnel at the site of the proposed new bridge.

The prayer of the bill is that the Court adjudge that the complainant is by reason of its direct pecuniary interest entitled to maintain this suit; that The Central Railroad Company of New Jersey is without right or power to construct the proposed new bridge, and that the construction would constitute an unlawful purpresture and a public nuisance; that the Acts of Congress of August 8, 1919, and February 15, 1921, are unconstitutional; that the construction of the new bridge without the permission of The Port of New York Authority and/or the Board of Commerce and Navigation is unlawful, and that the Court grant temporary and permanent injunctions (Rec., pp. 25-26).

The Intervenors.

The State of New Jersey, prior to the hearing before the District Court, filed its petition for leave to intervene (Rec., pp. 74-79) and prayed for the same injunctive relief as that prayed for in the complaint. An order grant-

ing leave to intervene was duly made (Rec., p. 80). The State joined in the complainant's motion for a preliminary injunction, and the State's motion, as well as the complainant's, was denied by the District Court, whose final decree was affirmed by the Circuit Court of Appeals (Rec., p. 110). The State joined the complainant in praying an appeal to this Court, which was granted (Rec,. p. 111).

The City of Jersey City, intervenor, followed precisely the same course as the State of New Jersey.

Assignments of Error.

The appellants, while maintaining in their assignments of error that the Court below erred in holding that the motion of the complainants for injunctive relief was properly denied, in holding that the defendant railroad was authorized to proceed with the erection of the proposed bridge without the approval either of the State Board of Commerce and Navigation or of the Port of New York Authority, in holding that no *prima facie* case had been presented and in holding that the bill was properly dismissed, principally rely on the fourth and fifth assignments of error, which read as follows:

> "4. The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority.
>
> "5. The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one State, and to render the authorization thereof by such State unnecessary" (Rec., p. 112).

And in addition to the foregoing, the *ratio decidendi* of the Circuit Court of Appeals has made necessary the following assignments of error:

> "6. The court erred in holding that there had been an exercise of the power of eminent domain by the United States in connection with the bridge described in the Bill of Complaint.
>
> "7. The court erred in refusing to hold that the concurrent assent of both the State and the Federal Government is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.
>
> "8. The court erred in refusing to hold that the source of power to construct a bridge over navigable waters wholly within the confines of one State is in the State itself" (Rec., p. 112).

The Issues In This Court.

The appellee Railroad relies upon the Special Acts of Congress passed in 1919 and 1921 (Appendix, *post*, pp. 107 and 108) for its authority to build the bridge and contends that by these acts and by the Bridge Act of 1906, to which they refer, the Congress exercised its plenary power over interstate commerce and granted the Railroad full authority, free from state control, thus overriding the disapproval of the bridge by the duly constituted authorities of the State of New Jersey. The appellants contend that these Special Acts and the Bridge Act merely granted the consent of the United States in the exercise of its concurrent power to regulate navigation, without interfering with the reserved powers of the State of New Jersey over waters wholly within its boundaries.

The Circuit Court of Appeals said in its opinion (Rec., p. 108):

> "The complainants contend that these Amendments require that the concurrent consent of both

> State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound? The decision of this case depends upon the answer to this question. The State of New Jersey refused to give its consent and if that consent is necessary before the bridge may be lawfully built the will of the State, and not that of the Federal Government, is supreme."

The foregoing excerpt from the opinion does not, however, show proper appreciation of the appellants' alternate contention that, leaving the constitutional question to one side, the Congress, in passing the Bridge Act of 1906 (34 Stat., 84) and the Special Acts (41 Stat., 277 and 1099), had no intention to dispense with State assent to bridges in cases where the proposed bridge was over navigable waters wholly within one State.

The contention of the appellants, briefly stated, therefore, is that the Special Acts of 1919 and 1921, and the Bridge Act of 1906 to which they refer must be held unconstitutional and void and not a justification for the threatened conduct of the defendant railroad, or must be construed to make State assent to the bridge as indispensable to its legality as the federal, so that the conduct of the defendant remains unlawful until such State assent is secured.

The Circuit Court of Appeals in its opinion properly rejected the view of the District Court (Rec., p. 93) that the consent to a bridge at the point in question given by the State in 1860 "expands" to embrace the replacement of the original bridge by one whose interference with

navigation is far more serious than that caused by the original bridge.* Furthermore, the allegations in the bill (Rec., p. 16) that the proposed bridge has not received the State's consent are allegations of fact which are admitted by the motion to dismiss. *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924).

The appeal brings up before this Court the right of the State of New Jersey to injunctive relief, and not merely the right of the original complainant. For the District Court was unquestionably empowered to permit the State's intervention, and any other action would have been error. "It would be especially unbecoming," said PUTNAM, Circuit Judge, in *Percy Summer Club* v. *Astle*, 110 Fed., 486, 488 (C. C. A., 1st Circ., 1901), "for the federal courts to pass on a great question in which a sovereign state of the Union has a direct interest, if not as lord paramount, at least as representing all its citizens, without affording it an opportunity to be heard before the legal proceedings in which the question is involved are concluded." Intervention by the State of New Jersey having occurred, it was the duty of the Courts below, and in so far as that duty remains unfulfilled it is the duty of this Court on appeal, to "adjust its judgment according to the rights disclosed on the part of the government thus intervening." *Stanley* v. *Schwalby*, 147 U. S., 508, 513 (1893).

*This holding of the District Court was plainly incapable of reconciliation with such decisions in this Court as *Illinois Central R. R.* v. *Illinois*, 146 U. S., 387, 453, 460 (1892) and *Charles River Bridge* v. *Warren Bridge*, 11 Pet., 420, 547-553 (1837). See also *Arnold* v. *Mundy*, 6 N. J. L., 1, 78 (1821); *Townsend* v. *Brown*, 24 N. J. L., 80, 87 (1853); *People* v. *New York & Staten Island Ferry Co.*, 68 N. Y., 71, 76-77 (1877); *Milwaukee* v. *Gimbel Bros.*, 130 Wis., 31, 36 (1906); *Louisville Bridge Co.* v. *United States*, 242 U. S., 409, 417 (1917).

POINT I.

The source of power to construct a bridge over navigable waters wholly within the confines of one State is in the State itself. The federal regulations are permissive only.

This point is the basis of the eighth assignment of error, and is a principle of such fundamental importance that we believe its restatement at the threshold is essential before we enter upon a detailed discussion of the intent of Congress in passing the Bridge Act of 1906, upon which rest the Special Acts of 1919 and 1921.

1. The *International Bridge* case.

Probably the latest pronouncement by this Court in a case involving the power and continuing control of a State over a bridge erected according to plans approved by the Secretary of War, is the case of *International Bridge Co.* v. *New York,* 254 U. S., 126 (1920). This was an action by the State of New York to recover penalties incurred by the failure of the defendant to construct a roadway for vehicles and a pathway for pedestrians on its bridge over the Niagara River between New York and Canada. The International Bridge Company was incorporated by a special act (N. Y. Laws 1857, c. 753) for the purpose of constructing a bridge at the site in question. A Canadian corporation was also formed under the Canadian laws; and by an act of the State of New York (N. Y. Laws 1869, c. 550), the two corporations were consolidated, provision being made in the statute that the bridge was to be as well for the passage of persons on foot and in carriages as for the passage of trains. The act of Congress thereafter passed approved the plans for the bridge as set

forth in the State statute. Upon its completion the bridge received the affirmative approval of Congress and was "hereby declared to be a lawful structure, and an established post route for the mail of the United States" (18 Stat., 275).

In 1899 the bridge was rebuilt without roadways and footpaths, pursuant to plans approved by the Secretary of War, but not by the State authorities. The rebuilding was completed in the year 1901. In 1907 the Secretary of War gave notice to the company that the bridge obstructed navigation and required changes. The bridge was again reconstructed under the direction of the Secretary of War, without roadways and footpaths. The consent of the State authorities was, on this occasion also, neither sought nor obtained.

Thereafter in 1915 the State of New York awoke from its apathy and passed a statute (N. Y. Laws 1915, c. 666) which provided that the Bridge Company should proceed to equip its bridge with a roadway for vehicles and a pathway for pedestrians by January 1, 1916, and provided that the company should be fined $50 a day for each day it remained in default. The company failed to comply with the statute, and a suit was instituted for the penalties in the name of the People of the State of New York. The company averred that the statute of 1915 was unconstitutional because all State control over the bridge had ceased upon the action of the federal authorities in 1899 and in 1907. The People recovered a judgment, which the highest court of the State affirmed (223 N. Y., 137). This Court, to which the case was taken on writ of error, affirmed the decision of the New York Court of Appeals. As to the nature of the congressional power in the premises, the Court of Appeals had said (p. 145):

> "It [the federal government] could give its consent to the construction of a bridge upon such terms as it saw fit and even after the bridge

was built, if it interfered with commerce, could withdraw its consent and compel its removal. It did consent that the defendant construct piers for the bridge on property of the state, and the bridge, with the consent of the state, was built on such property. No way was provided for pedestrians or vehicles. It was built primarily for interstate and foreign commerce, but this did not give the United States any other or greater supervision over it than it otherwise had. It could simply regulate its use for interstate and foreign commerce. This did not subject the defendant to the control of the United States government in any other respect. It still remained a New York corporation which state had the power to regulate within its limits matters of internal police, including in that general designation 'whatever would promote the peace, comfort, convenience and prosperity of its people.'* This power included among other things the construction of bridges within its territory."

This Court, affirming, said, *per* Mr. Justice HOLMES (p. 132):

"The part of the structure with which we are concerned is within the territorial jurisdiction of the State of New York. There was no exercise of the power of eminent domain by the United States. The State was the source of every title to that land and, apart from the special purposes to which it might be destined, of every right to use it. Any structure upon it considered merely as a structure is erected by the authority of New York. The nature and qualifications of ownership are decided by the State, and although certain supervening uses consistent with those qualifications cannot be interfered with by the State, still the foundation of a right to use the land at all must be laid by State law. Not only the existence of the Company but its right to build upon New York land came from New York, as was

*This definition is, with slight verbal changes, taken by the Court of Appeals from *Escanaba Co.* v. *Chicago*, 107 U. S., 678, 683 (1882).

> recognized by the form of the original Act of Congress of 1870, which speaks of any bridge built 'in pursuance of' the New York statutes. It did not, as perhaps the New York Consolidation Act did, refer to those statutes simply as documents and incorporate them, it referred to them as the source of the Company's power."

The Court then took up the cases of *Escanaba Company* v. *Chicago*, 107 U. S., 678 (1883) *post*, p. 60, and *Cummings* v. *Chicago*, 188 U. S., 410 (1903), *post*, pp. 32-33, saying (pp. 132-133):

> "From an early date the State has been recognized as the source of authority in the absence of action by Congress. Willson v. Blackbird Creek Marsh Co., 2 Pet., 245; Escanaba Co. v. Chicago, 107 U. S., 678. *And this Court has been slow to interpret such action as intended to exclude the source of rights from all power in the premises.* In a case of navigable waters wholly within a State, over which a right of way had been conveyed to the United States and which the United States was spending considerable sums to improve, it was held that, whether or not Congress had power to authorize private persons to build in such waters without the consent of the State, an act making comprehensive regulations of work within them did not manifest a purpose to exclude the previously existing authority of the State over such works. Cummings v. Chicago, 188 U. S., 410, 413, 428, *et seq.*"

The Court referred to the Bridge Act of 1899 and said by way of conclusion (p. 133):

> "The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State. It merely subjects the right supposed to have been obtained from there to the further condition of getting from Congress consent to action upon the grant."

We feel constrained to express our amazement at the method by which the Circuit Court of Appeals distinguished the *International Bridge* case. The Court said (Rec., p. 109):

> "But in that case, the United States had not exercised the power of eminent domain."

If the implication from this language is that the United States *did* exercise the power of eminent domain in the case at bar, the Court has fallen into a double error: for (1) the record is absolutely devoid of anything that could by any possible construction be cited to support such a finding, and (2) even if the United States had attempted to exercise the power of eminent domain over the lands under water in question, the attempt would have been void under settled principles of law. See *Pollard's Lessee* v. *Hagan*, 3 Howard, 212 (1844), holding a patent from the Federal government to lands under water in Alabama insufficient to support an action of ejectment. The Court said (p. 230):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers."

And see Point V, sub-point 1, *post*, page 65, and sub-point 3, *post*, page 74.

To say, as did the Courts below in the case at bar, that Congress has, in approving the Newark Bay Bridge, completely covered the field to the necessary exclusion

of all State authority in the same field, is to extend beyond its true limits the action which Congress takes when it approves a bridge. *When Congress consents to the erection of a bridge, it acts on an existing situation a necessary incident of which is a vital State law.* We may leave to one side the exceptional cases where Congress has created a federal corporation to construct an interstate bridge. In the ordinary case, what comes first is a grant by the State of power, which grant may take the form of a statute enlarging the corporate capacity* of the corporation which is to build the bridge; Congress, this Court said in *International Bridge Co.* v. *New York, supra,* "assumes that the right comes from another source, that is, the State." And see *Erie Railroad* v. *Board of Public Utility Commissioners of N. J.,* 254 U. S., 394, 411 (1921), *post,* p. 19. The State law embodying the grant of power is not nullified by the later federal grant; on the contrary, its continuing vitality is necessary to the successful outcome of the transaction. For only a grantee having power to receive and act on the grant could avail of it. The capacity to take must not be confused with the making of the conveyance. The capacity to take the grant comes from State law; the conveyance itself is an act of federal law. The co-operation of both laws is an indispensable element. To take an analogy: just as the contracts clause of the Constitution

> "presupposes the existence of contracts by the act of the parties, and the existence of their obligation, not by authority of the constitution, but by authority of [state] law" (*Ogden* v. *Saunders,* 12 Wheaton, 213, 326 [1827]),

so also do the Acts of Congress in the instant case—as in the *International Bridge* case, *supra*—presuppose the

*We need only turn to page 11 of the record before us for a precedent where the Act in which the State has authorized a bridge has been in form an amendment to the corporate charter of the corporation which is to build the bridge.

existence of a State law conferring power to build the bridge; and this State law continues to possess efficacy and must still be looked to as the indication of the limits of that power after the issuance by the Secretary of War of a permit under the Bridge Act of 1906.

In *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S., 365, 368 (1897), this Court said:

> "The mere delegation to the Secretary [of War] of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end."

To say that the congressional manifestation of consent nullifies the State law is to say that after we have built the roof of the house we can dispense with the foundations.

The assumption by Congress that the power to build the bridge which was the subject matter of the decision in *International Bridge Company* v. *New York, supra*, comes from the State, is an assumption which must of necessity be made in the case of a bridge to be erected over tidal waters within the State of New Jersey. In fact, we pass beyond assumptions in this case into the realm of established facts and well-settled rules of law. In *Hoboken* v. *Pennsylvania Railroad Co.*, 124 U. S. 656 (1888), Mr. Justice MATTHEWS said (p. 688):

> "In the examination of the effect to be given to the riparian laws of the State of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged

> lands of the navigable waters of the State, were, according to its laws, the property of the State as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the Constitution upon Congress to regulate foreign and interstate commerce."

This doctrine of the necessity of looking to the State as the primary source of power is reflected in the case of *Erie Railroad Company* v. *Board of Public Utility Commissioners of New Jersey*, 254 U. S., 394 (1921), where this Court upheld the State's power to abolish grade crossings on a railroad used in interstate commerce, saying, *per* Mr. Justice HOLMES (p. 411):

> "To engage in interstate commerce the railroad must get on to the land and to get on it must comply with the conditions imposed by the State for the safety of its own citizens."

Application to the State for permission to enter upon lands is all the more necessary where, as here, the lands are lands under a navigable body of water and hence are owned by the State in its sovereign capacity. *Hoboken* v. *Pennsylvania Railroad Company, supra;* and see the authorities discussed in Point V, sub-point 1 of this brief.*

The congressional power referred to in the *Hoboken* case is, as will be more fully demonstrated in Points II and III, a power to abolish obstructions licensed by the State, and not a power to place erections on State

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*Congress seems always to have been aware that the approval of a bridge by the War Department, and a permit to enter upon lands in order to erect piers, etc., for the bridge, are separate and distinct things, and that the War Department's approval is not such a plenary authorization as to include the latter right. See 32 Stat., 374, where Congress, in extending the provisions of the 1899 Act to the Illinois and Mississippi Canal, added a special proviso to the effect that the Secretary of War, in approving plans for bridges over the Canal, might grant to the builder of the bridge the right to place piers, etc., on Government lands along the Canal.

land without the State's assent. The necessary federal paramountcy may be established by a holding to the effect that even though a bridge has State sanction, that is not enough to prevent its abolition if it contravenes federal standards as to what obstructs navigation.

2. The War Department's own view concerning the present state of the law, as evidenced by an opinion of the Judge-Advocate General given in 1922.

In *Kaw Valley Drainage District* v. *Missouri Pacific Ry. Co.*, 111 Kansas, 183, 207 Pac., 218 (1922), the Court refused to enjoin the reconstruction of a certain bridge on plans approved both by the State and by the War Department. The Court viewed the plaintiff's conduct as captious, and quoted in full as an Appendix to its opinion a "Memorandum for the Secretary of War" wherein was set forth the advice the Secretary acted on in issuing, over the protests of this plaintiff, his approval of the bridge plans in question. The Memorandum is dated February 18, 1922, and is signed by J. A. HULL, Acting Judge-Advocate General, and by J. M. WAINWRIGHT, Assistant Secretary of War. After citing and commenting on *Cummings* v. *Chicago, Lake Shore & M. S. Ry. Co.* v. *Ohio, Escanaba Company* v. *Chicago, Montgomery* v. *Portland,* and other cases (all of which are dealt with at length in Point II, sub-point 2, *infra*), the memorandum continues (p. 192):

> "This comment seems necessary because of the great weight which complainants attach to the instrument whose revocation they seek and which is referred to in several places in their brief as a 'permit.' *The fact is that without the requisite state authority it is ineffectual.* It is true that it is not the practice of the War Department to

> issue instruments of approval in cases of this nature unless there is a showing of state authority for the work, and such a showing appears in the present case; *but the action of the War Department has, of course, no binding effect upon the state,* whose power in the matter is plenary and will not be interfered with by the federal government unless it come in conflict with the power vested in the federal government with respect to the protection, preservation and improvement of navigation." (Italics ours.)

The Judge-Advocate General's opinion, we submit, cannot be lightly disregarded. It evidences a "contemporaneous and long continued previous practice" which should "be treated as decisive." *McPherson* v. *Blacker,* 146 U. S., 1, 36 (1892). And see the more elaborate discussion of the cogent effect of executive construction in *United States* v. *Midwest Oil Co.,* 236 U. S., 459, 472-473 (1915), where the Court said:

> "It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, lawmakers and citizens naturally adjust themselves to any long-continued action of the Executive Department—on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself—even when the validity of the practice is the subject of investigation."

And see to the same effect *Logan* v. *Davis,* 233 U. S., 613, 627 (1914); *Swendig* v. *Washington Water Power Co.,* 265 U. S., 322, 331 (1924).

The Phrase "Lawful Structure."

We shall take up the Bridge Act of 1906 in detail in Point II. Section 2 of the Act, however, merits comment at this point. The section provides:

> "That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, * * * ."

We submit that the Judge-Advocate General's Memorandum above referred to, taken in connection with the *International Bridge* case, persuasively shows that in using the words "lawful structure," Congress was speaking for the federal government alone, and was assuming that the expectant bridge builder would apply for his State license first; hence the words "shall be a lawful structure" were used to designate bridges whose builders had completed, or would in due time complete, the requisite preliminaries. Cf. *Chicago Transportation Co.* v. *Pennsylvania Co.*, 246 Fed., 190 (N. Dist. Ill., 1917), *post*, pp. 50-51, and *City of Beaumont* v. *Texas & New Orleans R. Co.*, 296 Fed., 523, 526 (E. Dist. Tex., 1924), *post*, p. 52n.

The reason why the *International Bridge Company* case, *supra*, directly supports this reasoning is that in that case this Court had before it an Act (18 Stat., 275) in which Congress said that the bridge as built in 1874 should "be a lawful structure," and yet this Court held that there was no sufficient covering of the field by federal law to effect the nullification of a State statute imposing conditions on the manner in which the bridge should be built. Furthermore, the bridge there before the Court was an international bridge, whereas the bridge in the case at bar is one wholly within the confines of one State.

The conclusion is supported further by the case of *Cleveland, Painesville & Ashtabula R. R. Co.* v. *Franklin Canal Co.*, Fed. Cas., 2890 (Circuit Court, W. D. Pa., 1853). Here the Court said:

> "The act of Congress [5 Stat. (L. & B. Ed.) 283] making all railroads post roads, means only such as have charters from the several states; it is not to be inferred that they intended to do anything in derogation of the sovereignty of a state, by declaring that to be a post road which was the work of an individual or of a company for his or their profit without law, or it may be in opposition to law."

And see *United States* v. *Railroad Bridge Co.*, 6 McLean, 517, 522-523, Fed. Cas., 16114 (Circuit Court, N. D. Ill., 1855).

In 8 Op. Attys.-Gen., 8, 11 (1856), there is reported an opinion of Hon. Caleb Cushing on the President's duty to extend federal aid upon the occasion of insurrections in any State. During the course of this opinion he observed:

> "As to the clause of the Constitution which makes it the duty of the President 'to take care that the laws be faithfully executed,' that, it is apprehended, refers primarily to the laws of the United States, and to those of a State or Territory only in the contingency when the case of insurrection therein is presented according to the Constitution and to acts of Congress."

To assume, as argued, that "lawful structure" refers to a bridge concurrently authorized by State and Federal Governments, will avoid precipitating grave constitutional questions (as we shall demonstrate in Point V, *infra*), and will exculpate Congress of the charge of having effected a revolutionary change without having had the courage to effect it openly.

3. The doctrine that the federal regulations are permissive only has been enunciated in a number of judicial decisions.

In *Cobb* v. *Commissioners of Lincoln Park,* 202 Ill., 427 (1903), the appellant had leave from the Secretary of War to erect a wharf in navigable waters wholly within the State of Illinois, and sought to enjoin interference by city officials, but the Court said:

> "* * * we are of the opinion that the act prohibiting the erection of wharves without the consent of the Secretary of War is a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation, and not that it is equivalent to a positive declaration by the authority of Congress that the licensee may build the wharf or other structure without first obtaining the consent of the owner of the submerged land on which it is his purpose to build. Appellant not having, by the law of this State, the right to construct a wharf over his neighbor's submerged lands without his neighbor's consent, could not acquire that right, without his neighbor's consent, by obtaining a license from the Secretary of War" (pp. 438, 439).

In the case of *Attorney-General* v. *Hudson County Water Company,* 76 N. J. Eq., 543 (1909), the authority granted by the Secretary of War was described as:

> "* * * a mere license from a supervisory power—a license to do the thing desired, efficacious only if and when lawful authority to prosecute the work shall have been obtained" (p. 559).

The Court (WALKER, V.-C.) went on to say (*ibid.*):

> "In this connection it may be observed that the tenth section of the River and Harbor act does not provide that it shall be lawful for the Secretary of War to authorize the excavation of land in the channel of any navigable waters of the United States, but only that it shall not be lawful to do the work without the authorization of the secretary, had before beginning the work. The section as worded clearly contemplates that the consent of the secretary shall merely be permissive of the doing of work for which authority already exists."

In *Hubbard* v. *Fort*, 188 Fed., 987 (Circuit Ct., Dist. N. J., 1911), the complainants were receivers of the Hudson County Water Company, and sought to have certain State officers enjoined from interfering with the construction of a water main under the Kill van Kull from Bayonne, N. J., to Staten Island, N. Y. A permit from the Secretary of War was set forth in the complaint. The pipes were to be used for the "interstate carriage and transfer of subterranean water" (p. 991). No State authorization had been secured. Defendant demurred. Judge RELLSTAB sustained the demurrer.

After citing and quoting from both *Cobb* v. *Commissioners of Lincoln Park*, and *Attorney-General* v. *Hudson County Water Co.*, Judge RELLSTAB said (p. 994):

> "* * * In the New Jersey case will be found a critical review of the authorities relied upon by the complainants in this case. The complainants contend that such case does not give due effect to the cited authorities; but I have carefully considered such authorities, and I concur with the conclusion reached by V. C. Walker that they do not support the contention of complainants' counsel that a license obtained by the Water Company from the Secretary of War is plenary in its character."

Of course, here the complainants had merely a license from the Secretary of War and their project had no special Congressional sanction. But this does not impair the force of this case as an authority. For the Court recognized the distinction between structures across waters which are boundaries, and structures across waters the navigable portions of which are wholly within the limits of a single State. At page 992, Judge RELLSTAB said:

> "No such permit is necessary, however, if authority has been obtained from the United States Congress to make such crossing. It is well-settled law that state authority is not necessary to cross a navigable stream **between states** with instrumentalities engaged in interstate commerce; that such crossing may be made by authority of the Congress in spite of the State's protest."

The foregoing qualified language of the Judge's major premise must be borne in mind in reading his conclusion (p. 999):

> "This is not a case of the United States government seeking to make a crossing of this interstate stream in the exercise of its governmental powers, but an attempt to override a sovereign state's opposition to the use of its submerged land by a corporation of its own creation, under the claim of being engaged in interstate commerce. This can only be successfully accomplished when it shall be shown that Congress in the assertion of its superior rights under the interstate commerce clause of the United States Constitution has clearly and definitely authorized such crossing [*i. e.*, from one State to another]. Until then the State of New Jersey as against every comer is sovereign master of the situation."

See also *Economy Light & Power Co.* v. *United States,* 256 Fed., 792, 799 (1919), aff'd 256 U. S., 113 (1921).

In short, the power of Congress to control navigable waters which are a means of commerce and accessible from other states is a power to protect, preserve and improve navigation, not a power to impose obstructions to navigation which the State has expressly forbidden. It results that a State's sanction of a bridge may be annulled in the interests of navigation but a State's veto of a new bridge may not.

POINT II.

The concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters wholly within one State may be lawfully erected.

The practical effect of the position taken by the Courts below is that the Bridge Act of 1906 (34 Stat., 84), was intended to establish and has established, complete Federal paramountcy, and a complete supersession of all State legislation on the subject of bridges over navigable waters, even where such waters are wholly within one State.

In according the Act of 1906 such a far-reaching effect, it is submitted that the Courts below fell into error. Let us examine successively (1) certain general principles concerning the nature and scope of federal and state power in the premises; (2) the decisions of this Court, prior to 1906, whereby the doctrine of concurrent authorization became the law of the land; (3) the trend of the acts of Congress up to 1906; and (4) the text, legislative history and judicial construction of the Bridge Act of 1906.

1. General Principles.

The source of *Federal power* in the premises is the commerce clause. *Escanaba Company* v. *Chicago,* 107 U. S., 678, 682 (1883). In this case the Court said:

> "The power vested in the general government to regulate interstate and foreign commerce involves the control of the waters of the United States which are navigable in fact, so far as it may be necessary to insure their free navigation, when by themselves or their connection with other waters they form a continuous channel for commerce among the States or with foreign countries."

And see *United States* v. *Rio Grande Irrigation Co.,* 174 U. S., 690, 703 (1899), *post,* pp. 38-39, to which may be added *Leovy* v. *United States,* 177 U. S., 621, 637 (1900), holding a conviction for obstructing a navigable water by building a dam must be set aside because the water obstructed

> "was not shown by adequate evidence to have been a navigable water of the United States, *actually used in interstate commerce* * * *." (Italics ours.)

The source of the continuing *State power* in the premises concurrently with the Federal, is two-fold:

A. *The Police Power.* The Supreme Court of the United States, in *Louisville & Nashville R. Co.* v. *Kentucky,* 161 U. S., 677, 702 (1896), said:

"It has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce, so far as the legislation was within its ordinary police powers. Nearly all the railways in the country have been constructed under state authority, and it cannot be supposed that they intended to abandon their power over them as soon as they were finished. The power to construct them involves necessarily the power to impose such regulations upon their operation as a sound regard for the interests of the public may seem to render desirable. In the division of authority with respect to interstate railways Congress reserves to itself the superior right to control their commerce and forbid interference therewith; while to the States remains the power to create and to regulate the instruments of such commerce, so far as necessary to the conservation of the public interests.

"If it be assumed that the States have no right to forbid the consolidation of competing lines, because the whole subject is within the control of Congress, it would necessarily follow that Congress would have the power to authorize such consolidation in defiance of state legislation—a proposition which only needs to be stated to demonstrate its unsoundness."*

*We quote at some length from this opinion because of the suggestion of the Circuit Court of Appeals (Rec., p. 110) that the briefer quotation made on our brief below was misleading. With deference, it is submitted that since the case affirmatively upheld a certain form of State regulation against the contention that it burdened interstate commerce, the passage to the omission of which the Court below adverted is a mere dictum and does not lessen the force of the case for the purpose for which we cite it.

The accepted definitions of the police power are, of course, broad enough to embrace the action of the State of New Jersey in the case at bar in (*i*) authorizing the City of Newark to construct and maintain the Port Newark Terminal (Rec., p. 10), and (*ii*) denying to the defendant railroad permission to substitute a new bridge for the existing bridge (Rec., pp. 15-16). For the police power includes the power "to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." *Barbier* v. *Connolly*, 113 U. S., 27, 31 (1885). And see *Escanaba Company* v. *Chicago*, 107 U. S., 678, 683 (1883), where the Court expressly referred to the continued existence, *after Congressional action*, of the State's power (exercised in this case through a city ordinance) in "matters of internal police." This power, declared this Court, "embraces the construction of * * * bridges * * * and it can generally be exercised more wisely by the States than by a distant authority."

B. *The Inherent Sovereignty of the States.* This aspect of the State's power is described in *Hardin* v. *Jordan*, 140 U. S., 371, 381 (1891); it is particularly well expressed in *People ex rel. Murphy* v. *Kelly*, 76 N. Y., 475, 482 (1879), where the Court of Appeals, in upholding the power of the State to authorize certain municipal corporations to subscribe to stock in the New York Bridge Company in order to finance the Brooklyn Bridge, said:

> "The East river is a public navigable water, and to bridge it required the concurrent authority of the State of New York, and of the United States; of the former, by reason of its rights in the lands on the shore, and under the water, and of its qualified sovereignty over the water; and of the latter, by reason of the exclusive power of

> Congress to regulate commerce, and to determine, in its regulation thereof, to what extent navigation upon the water may be obstructed or interfered with."

And see *International Bridge Co.* v. *New York, ante,* p. 12.

Sub-point B, *supra,* is after all not in essence different from sub-point A; for as TANEY, C. J., observed in the *License Cases,* 5 Howard, 504, 583 (1847).

> "But what are the police powers of a State? They are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions."

2. The Doctrine of Concurrent Authorization had been firmly established by decisions of this Court prior to 1906.

In *Lake Shore & Michigan Southern Railway Co.* v. *Ohio,* 165 U. S., 365 (1897), the Court held that the Act of September 19, 1890 (26 Stat., 426, 453), requiring a permit from the Secretary of War as a prerequisite to the lawful erection of a bridge over navigable waters, did not have the effect of depriving the States of all authority over navigable streams wholly within the State. Mr. Justice WHITE said (p. 369):

> "The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of

> Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction. It follows, therefore, that, even conceding *arguendo* that the words 'navigable waters' as used in the act were intended to apply to streams wholly within a State, its obvious purpose was not to deprive the States of authority to grant power to bridge such streams, or to render lawful all bridges previously built without authority, but simply to create *an additional and cumulative remedy* to prevent such structures, although lawfully authorized, from interfering with commerce." (Italics ours.)

In *Cummings* v. *Chicago*, 188 U. S., 410 (1903), the plaintiff-appellant having secured leave of the Secretary of War to construct a pier in a navigable stream, sought to enjoin the City of Chicago from interfering with the prosecution of the work. The consent of neither the City of Chicago nor the State of Illinois had been secured. The Circuit Court denied relief and this Court affirmed. Mr. Justice HARLAN stated the questions before the Court thus (p. 428):

> "Did Congress, in the execution of its power under the Constitution to regulate interstate commerce, intend by the legislation in question to supersede, for every purpose, the authority of Illinois over the erection of structures in navigable waters wholly within its limits? Did it intend to declare that the wishes of Illinois in respect of structures to be erected in such waters need not be regarded, and that the assent of the Secretary of War, proceeding under the above acts of Congress, was alone sufficient to authorize such structures?"

The answer given to the questions was an emphatic negative, the holding being that Section 10 of the River and Harbor Act* of 1899 (30 Stat., 1151)

*Quoted, in part, in Appendix, *post*, pp. 97-98.

> " • • • is not so worded as to compel the conclusion that Congress intended, by that section, to ignore altogether the wishes of Illinois in respect of structures in navigable waters that are wholly within its limits" (p. 430).

The Court went on to say that (pp. 430-431)

> " • • • we will not at this time make any declaration of opinion as to the full scope of this power or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the expressed will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It it only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the National Government and the state government. *The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State acting by its constituted agencies.*" (Italics ours.)

The doctrine of the *Cummings* case was reiterated in *Montgomery* v. *Portland*, 190 U. S., 89 (1903), where the Court, after referring to the River and Harbor Act of 1890 relating to the necessity of conforming to regulations made by the Secretary of War in the construction of piers, etc., in navigable waters, expressly held that it

did not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. The Court said (p. 106):

> "There is nothing in the present case to distinguish it from the *Cummings* case. While section 12 of the act of 1890 forbade the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the Secretary of War, in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him,' it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the Secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the States. Congress has not, however, indicated its purpose to wholly ignore the original power of the States to regulate the use of navigable waters entirely within their respective limits."

The Court concluded:

> *"We hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the General and state Governments"* (190 U. S. at p. 106; italics ours).

See also *Gring* v. *Ives*, 222 U. S., 365, 367-370 (1912), where the Court unequivocally said that the Act of 1899 did not operate to paralyze all State power concerning structures in navigable waters within their borders.

3. The trend of legislation in Congress since 1880 on the subject of bridges over navigable waters shows consistently a purpose to aid navigation; the development of land commerce has been either subordinated to navigation in these statutes or ignored altogether.

The history of Congressional measures on the subject of navigable waters shows *aid to navigation* as their dominant purpose.*

In 1880 (21 Stat., 180, 197) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 4) to the effect that:

> "Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States shall be obstructed or endangered by any sunken vessel or watercraft, it shall be the duty of the Secretary of War * * *"

to order the owner to remove it, or else proceed to remove it himself, using treasury funds for the purpose.

In 1884 (23 Stat., 133, 148) Congress appended to a Rivers and Harbors appropriation act the following provision (Sec. 8):

> "Sec. 8. That whenever the Secretary of War shall have good reason to believe that *any railroad or other bridge* now or hereafter to be constructed over any of the navigable waters of the United States, under authority of the United States or of any State or Territory, *is an obstruction to the free navigation of such waters,* by reason of difficulty in passing the draw-opening or the raft-span of said bridge, by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, on satisfactory proof thereof, to require the company or persons owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of

*See in this connection Point V, sub-point 2, *post*, p. 70.

> said raft-span, or of both said draw-opening and raft-span to be constructed, placed and maintained, at their own cost and expense, in the form of booms, dikes, piers or other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span, or both said opening or span as shall be specified in his order in that behalf; and on failure of the company or persons aforesaid to make and establish such additional structures within a reasonable time, the said Secretary shall proceed to cause the same to be built or made at the expense of the United States, and shall refer the matter without delay to the Attorney-General of the United States, whose duty it shall be to institute, in the name of the United States, proceedings in any circuit or district court of the United States in which such bridge, or any part thereof, is located, for the recovery of the cost thereof; * * *." (Italics ours.)

In July, 1888 (25 Stat., 400, 424) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 9) substantially similar to that in the Act of 1884. The words "under the authority of the United States or of any State or Territory" occurring in the 1884 Act were omitted, doubtless because they were surplusage, or because the law had been clarified by the decision of this Court in *California* v. *Pacific Railroad Co.*, 127 U. S., 1 (April, 1888). The possible modes of obstruction were elaborated to include "by reason of insufficient height, width of span, or otherwise." Certain penal provisions were embodied in Section 10.

In 1890 (26 Stat., 426, 453) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 4) amending and re-enacting Section 9 of the Act of 1888. The tenor of it remained unchanged. The word "unreasonable" was inserted before the word "obstruction." Before ordering alterations, the Secretary of War was required first to give "the parties reasonable opportunity

to be heard"; alterations to be ordered must be such as will "render navigation * * * reasonably free." In giving notice of his order, the Secretary of War was required to "specify the changes required to be made." Provisions were added relating to

> obstruction of navigation by deposits of refuse (Sec. 6);
> obstruction of navigation by erection of wharves (Sec. 7);
> establishment of harbor lines (Sec. 12).

A development in the direction of far-sightedness is found in Section 7, which provides for preventive relief in addition to the relief by abatement afforded by Section 4. In Section 7 (p. 454) Congress declared:

> "* * * it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road, road-stead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War * * *."

Then follow certain provisos, one of which is to the effect that the act shall not be construed to authorize the construction of a bridge under an act of the legislature of any State over a "navigable water not wholly within the limits of such State."*

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*This more or less cryptic passage was termed by Mr. Justice White "a negative pregnant with an affirmative" and was construed by him to preserve to the the States their authority over navigable streams wholly within their limits. *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, 165 U. S., 365, 369 (1897). The passage in question was rephrased in the Act of 1899 so as to express unequivocally the intent which Mr. Justice White had ascertained by inference. See *post*, p. 39.

This proviso has a three-fold importance:

(1) It is the first gesture toward the impairment of a State law relating to navigable waters;

(2) Its tendency is to annul a State's sanction, but not to override a State's veto;

(3) It applies only where the navigable water is *not wholly within the confines of one State.*

In 1892 (27 Stat., 88, 110) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 3) which, *inter alia,* amended and re-enacted Section 7 of the Act of 1890. The changes were little more than verbal, and the proviso specially referred to above was not altered.

Between the passage of this statute and the next, the Supreme Court handed down its decision in *United States* v. *Rio Grande Irrigation Company,* 174 U. S., 690 (1899) to the effect that the Act of 1892, in making it unlawful to alter or modify the capacity of a navigable water without the approval and authorization of the Secretary of War, prohibited taking the waters of a stream for irrigation purposes without congressional authority even though State assent had been expressly given and even though the water was being diverted at a point some three hundred miles above the navigable portion. The opinion contains (pp. 705-708) a *resumé* of the statutes on the subject. As to the nature of the federal power in the premises, the Court said (p. 703):

> "In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures *to preserve the navigability of the navigable water courses of the country even against any state action.* It is true there have been frequent decisions recognizing the power of the State, in the absence of Con-

> gressional legislation, to assume control of even navigable water within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court [citing cases]." (Italics ours.)

In 1899 (30 Stat., 1121, 1151) Congress appended to a Rivers and Harbors appropriation act a provision (Sec. 9)* wherein the prohibition against the construction of a bridge over navigable waters was made absolute

> "until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War."

Then follows a proviso whose chief departure from that in the two preceding enactments lies in the substitution of an affirmative for a double negative and in other changes lessening ambiguity. The proviso in the 1899 Act reads:

> "*Provided*, That such structures may be built under the authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced * * *."

*This section and Section 10 are set forth in the Appendix, *post*, pp. 97-98.

Section 10 forbids "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the navigable waters of the United States"; projection beyond harbor lines may only be built on plans recommended by the Chief of Engineers and authorized by the Secretary of War; the same provision is made regarding the alteration of channels, harbors, *et cetera.* Section 11 relates to the establishment of harbor lines, and for the regulation of projections. Section 12 contains provisions for enforcing the act by penalties and mandatory injunctions. Section 13 forbids the deposits of refuse in navigable waters, with a proviso to the effect that

> "the Secretary of War, whenever in the judgment of the Chief of Engineers *anchorage and navigation will not be injured thereby,* may permit the deposit of material * * * in navigable waters, within limits to be defined * * *." (Italics ours.)

Section 14 forbids interference with wharves, levees and other works used by the United States

> "for the preservation and improvement of any of its navigable waters or to prevent floods, or as boundary marks, tide gauges, surveying stations, buoys," etc.

Section 15 forbids anchoring vessels or floating logs

> "in such manner as to obstruct, impede or endanger navigation."

Section 16 provides penalties for violations of the four preceding sections. Section 17 orders the Department of Justice to enforce the Act. Section 18 provides for the removal or alteration of bridges found by the Secretary of War to be

> "an unreasonable obstruction to the free navigation of such waters," *i.e.,* "navigable waterways of the United States."

Section 19 provides for the removal by the Secretary of War of sunken vessels when thereby the

> "navigation of any river * * * or other navigable waters of the United States shall be obstructed or endangered * * *."

Section 20 allows the Secretary of War, through his agents, in certain emergencies, to remove or destroy vessels which have grounded in any canal, lock, or other navigable waters

> "in such manner as to stop, seriously interfere with, or specially endanger navigation."

and

> "to clear immediately the canal, lock, or navigable waters aforesaid of the obstruction thereby caused * * *."

The concluding paragraph of this section repeals all laws inconsistent with Sections 10 to 20 inclusive.

4. There is absent from the Bridge Act of 1906 any expression of an intent so to change the law as to dispense with State assent. This appears from (A) the Legislative History of the Act, and (B) Decisions Subsequent to Its Enactment.

A. The Bridge Act of 1906 and Its Legislative History.

We come now to the Act of March 23, 1906 (34 Stat., 84), which is printed in full in the Appendix, *post*, pp. 99 *et seq.*, and bears the title: "An Act to regulate the construction of bridges over navigable waters." *This act does not repeal any previous statute.* It has itself never been repealed or amended.

Section 1 may be said to aim primarily at standardization—at making the Congressional consent to bridges thereafter erected conditional upon their conformity to certain requirements. Congress thereby relieved itself from setting forth the requirements every

time it consented to a bridge. This has been the way the Act has operated in practice. Thus in the case at bar Congress in authorizing the proposed bridge merely authorized the defendant railroad to construct, maintain and operate it "in accordance with the provisions of the Act entitled 'An act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

Section 2 provides:

> "That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, * * *."

The phrase "shall be a lawful structure" has already been discussed herein in Point I at p. 22, *supra.*

Section 3 provides that when one railroad company erects a bridge in conformity with the conditions set forth in the Act, other railroads may, under certain circumstances, secure trackage rights thereon upon paying just compensation.

Section 4 is in substance the same as Section 8 of the Act of 1884. It empowers the Secretary of War to compel the alteration of bridges whenever they

> "in the opinion of the Secretary of War, at any time unreasonably obstruct such [free] navigation on account of insufficient height, width of span, or otherwise * * *."

This section provides also for the lighting and prompt opening of draws, and for the limitation of tolls to reasonable figures.

Section 5 imposes penalties for failure to observe the requirements of the Act. The section contains at the end this sentence:

> "* * * and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any

> bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of said obstruction or bridge touches" (34 Stat., 86).

Section 6 embodies a general time limit within which bridges thereafter authroized must be commenced and completed.

Section 7 defines the word "persons."

Section 8 reserves the right to amend, alter, or repeal the Act as to bridges which may be erected in accordance with its terms. This section recognizes the possibility that a structure may be pronounced lawful and unobstructive of navigation when built, and the contrary found regarding it years later. Cf. *Bridge Company* v. *United States,* 105 U. S., 470, 480 (1881); *Louisville Bridge Co.* v. *United States,* 242 U. S., 409, 425 (1917).

The statute does not say when the consent of Congress is necessary. It begins by saying

> "when, hereafter, authority is granted by Congress * * *."

Hence we must refer to the previous Act of 1899 to ascertain when congressional authority must be sought; and the provisions of the Act of 1899 are neither enlarged nor reduced by the Act of 1906.* Hence, the proviso in Section 9 of the Act of 1899, rendering Congressional consent unnecessary, and the approval of the plans by the Chief of Engineers and the Secretary of War sufficient, where the bridge is to cross waters the *"navigable portions of which lie wholly within the limits of a single State"* is law to-day; and the decisions under the Act of 1899—*Cummings* v. *Chicago* (188 U. S., 410)

*The failure of the Act of 1906 to set up a criterion for the determination of the necessity *vel non* of Congressional consent is one reason why the Act has so rarely been cited in bridge cases arising after its passage. The Supreme Court has based its decisions on the Act of 1899 and its interpretations of the provisions of that Act, and has felt it unnecessary to cite the Act of 1906 which, so to speak, incorporates the earlier Act by reference.

and *Montgomery* v. *Portland* (190 U. S., 89), *ante*, pp. 32 and 33, are still precedents of unimpaired authority.

Since the Act of 1899 was held in the cases last cited not to have effected a supersession of State laws, and since the Act of 1906 appears upon analysis to cover the same ground—which, in fact, are the words the Supreme Court used in reference to it in *Union Bridge Co.* v. *United States*, 204 U. S., 364, 367 (1907), *post*, p. 49—it follows that the failure of the State to consent to the proposed bridge in the case at bar is a circumstance which must be accorded full force and effect. Such a conclusion is necessary if recognition is to be given to the rule which requires an intent on the part of Congress to supersede State laws to be "clearly manifested." *Illinois Central R. R. Co.* v. *Public Utilities Commission*, 245 U. S., 493, 510 (1918), *post*, p. 55. Moreover, it is the only conclusion consistent with logic; for the Act of 1899 is essentially a navigation measure and there is not a single section in the Act of 1906 that is not consistent with that purpose. Even Section 3 relating to the expropriation of trackage rights promotes navigation by making the erection of separate bridges for parallel railroads unnecessary. The same is true of that portion of Section 4 which declares that tolls must be reasonable. This guards against a situation where the exaction of excessive tolls on the only available bridge might result in the erection by persons interested of another bridge in the vicinity, with the resultant inconvenience to navigation. The statute, in short, clearly recognizes the principle stated as long ago as *Lorman* v. *Benson*, 8 Mich., 18, 32 (1860), that the right of navigation is one "to which all others are subservient." This doctrine was quoted with approval in *Scranton* v. *Wheeler*, 179 U. S., 141, 163-164 (1900).

The Act being *in aid of navigation*, is it at all likely that Congress intended State laws imposing conditions on the right of the State's citizens to build bridges should be nullified? Would it *aid navigation* to dispense with the State's consent to a bridge?

Nowhere in this Act is there any statement which can be construed as dispensing with the necessity of State consent.

It is submitted that a reading of this Act of 1906, upon which the special Acts of 1919 and 1921 depend, does not disclose any expression which would justify this Court in extending the power of the United States Government to the exclusion of that of the States. This will become clearer if we examine the Committee Reports and the debates on the bill which became law in 1906.

Reports and Debates.

That Congress had no intention to dispense with the consent of the State to the construction of bridges over navigable waters wholly within its confines, is apparent from the reports which were made in Congress when the bill was under discussion, and from the remarks of the Committee member in charge of the bill in the House when the bill was being debated there. That courts should take judicial notice of such reports and statements was held by the Supreme Court in the recent cases of *United States v. St. Paul, M. & M. Ry. Co.*, 247 U. S., 310, 318 (1918), and *Duplex Printing Press Co.* v. *Deering*, 254 U. S., 443, 474-5 (1921). In the first case the Court said:

> "The remarks of Mr. Lacey, and the amendment offered by him, in response to an objection urged by another member during the debate, were in the nature of a supplementary report of the committee; and as they related to matters of common knowledge they may very properly be taken into consideration as throwing light upon the meaning of the proviso; not for the purpose of construing it contrary to its plain terms, but in order to remove any ambiguity by pointing out the subject-matter of the amendment. This is but an application of the doctrine of the old law, the mischief, and the remedy."

And in the second case the Court, after referring to the dubious value under ordinary circumstances of debates in the Congressional Record, was careful to add the following qualification:

> "But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S., 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Pennsylvania R. R. Co. v. International Coal Co., 230 U. S., 184, 198-199; United States v. Coca-Cola Co., 241 U. S., 265, 281; United States v. St. Paul, Minneapolis & Manitoba Ry. Co., 247 U. S., 310, 318" (254 U. S., at pp. 474-5).

The bill, which later became the Act of March 23, 1906, was introduced on December 11, 1905, in the first session of the Fifty-ninth Congress as H. R. 6009 (40 Cong. Rec., pt. 1, p. 309). The bill was introduced by Congressman Mann of Illinois, a member of the Committee on Interstate and Foreign Commerce, and was referred to that Committee. The entire report of the Committee (House Report No. 182, 59th Congress, First Session) is set forth in the Appendix, *post*, pp. 89-92). Its essence is found in this passage:

> "The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress. A further purpose is to prevent the cumbering up of the statute books by repeating in each bridge bill the same provisions, and also to shorten the time for considering and reading bridge bills in the two Houses of Congress. Under the practice now in force the Committee on Interstate and Foreign Commerce of the House and the Committee on Commerce of the Senate, having jurisdiction of

bridge bills, require the insertion in each bill of certain provisions. These provisions make the bill long, take up the time of the two Houses of Congress in the reading of them, and add to the length of the laws when enacted.

"The present bill gathers these provisions into one general law, so that hereafter a bill to authorize the construction of a bridge may be in form similar to the following:

> "A BILL to authorize John Doe Railroad Company to construct a bridge across the Richard Roe River, at or near Black Acre.
>
> "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the John Doe Railroad Company, its successors and assigns, be, and they are hereby, authorized to construct, maintain and operate a bridge across the Richard Roe River, at or near Black Acre, in the State of ———, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, nineteen hundred and ——.'"

When the bill was called up in the House on January 29, 1906, other members of the House raised certain objections to the bill, which Mr. Mann answered. The colloquy is to be found in 40 Cong. Rec., pt. 2, p. 1717, from which a lengthy quotation will be found in the Appendix, post, pp. 92-95. The gist of Mr. Mann's explanation is found in this passage:

> "Mr. Garrett: To what extent does the power of the Secretary of War now go on streams wholly within the limits of the State? That is, what is the extent of the power of the respective legislatures of the States and the extent of the power of the Secretary of War in regard to the construction of bridges across streams?
>
> "Mr. Mann: As I said before, the right, so far as the Government is concerned, is a mere license,* a right to prevent the construction of

*See cases cited, *ante*, pp. 24, *et seq.*

> bridges, and under the existing statute the Secretary of War is authorized, so far as the Government is concerned, to give consent to the erection of bridges over any stream wholly within the limits of a State. Of course, *the power to construct the bridges must be derived from the State itself*, but the Government does not interfere with the right to do this. In other words, the power of the Government is not exercised to regulate interstate commerce,* but to prevent the interference with navigation and navigable streams, and the Government merely waives its right in behalf of persons who must obtain their authority elsewhere. [Italics ours.]"

The foregoing excerpts from the Committee Report and from the debates show not the slightest inkling of an intention to make any such far-reaching change in the law as would result if the decision below were allowed to stand. Furthermore, the Acts (41 Stat., 277, 1099) in relation to the proposed Newark Bay bridge follow precisely the abbreviated form which, the report shows, Congress sought by the Act of 1906 to make an available substitute in the future for the more cumbersome form used in the past.

Therefore we feel justified in stating that if the Act of 1906 is construed as working a complete change in the law in derogation of the rights of the State of New Jersey, it will be in spite of the intention of Congress and not in furtherance of such intention.

B. Decisions subsequent to the Act of 1906.

That the Act of 1906 did not change the relative powers of Federal and State governments, but was simply intended to be a codification of existing law and in continuance of the same policy, is further demonstrated by

*That is to say, the object of Congressional solicitude is water-borne rather than land-borne commerce. See *post*, Point V, Sub-Point 2 (p. 70).

the fact that *the decisions of this Court since that Act have continued precisely along the same line, and the cases above referred to as having established the doctrine of concurrent authorization prior to the Act have been cited with approval by this Court as recently as 1920.*

We are not unmindful of the increased power and more detailed control over interstate commerce which Congress has taken to itself in the Transportation Act, 1920. *Dayton-Goose Creek Railway Co.* v. *United States,* 263 U. S., 456, 477-478 (1924). But we must construe the Act of 1906 in the spirit of the time of its passage; and the same is true of the special Acts of 1919 and 1921, for these were specific exercises of a general power for whose limits we are directed to look to the Act of 1906.

In *Union Bridge Co.* v. *United States,* 204 U. S., 364, 367 (1907), Mr. Justice HARLAN, in his statement of the case, set forth the history of legislation on navigable waters (the case before the Court being an information charging wilful failure to alter a bridge found by the Secretary of War to be an unreasonable obstruction to navigation), and said:

> "Finally, we have the act of March 23d, 1906, 34 Stat. 84, c. 1130, §§4, 5, *which covers the same ground as the act of 1899* under which the present information was filed." (Italics ours.)

The Supreme Court of Washington has expressly held that the Act of 1906 has no application to a bridge over navigable waters wholly within one State. In the case of *In re Westlake Avenue, Seattle,* 66 Wash., 277, 119 Pac., 798 (1911), the appellant sought to escape liability to pay an assessment for local improvements on the ground that the improvements included a bridge over a navigable water, and that the City had obtained merely the approval of the Secretary of War for the

structure, and had not obtained the consent of Congress. Appellant cited the Bridge Act of 1906. In overruling this contention the Court said (p. 285):

> "Appellants cite the Act of Congress of March 23, 1906, ch. 1130, 34 Stats. at L., 84, and contend that, by reason thereof, it will be necessary to obtain permission from the national government by special act of Congress before any bridge can be constructed by the city at Fremont and Westlake avenues. *The statute cited has no application to the construction of bridges across navigable waters which lie wholly within the limits of a single state.*" (Italics ours.)

The Court concluded (pp. 287-288):

> "From authorities cited, and the history of Congressional legislation, it is manifest that the national policy as to waters lying wholly within a state has at all times been that the state, or its authorized representatives, shall in the first instance, select locations and adopt plans for bridges, but that prior to actual construction, and for the protection of navigation, such locations and plans shall be approved by the secretary of war."

Another case arising after the passage of the Bridge Act of 1906 is *Chicago Transportation Company* v. *Pennsylvania Company*, 246 Fed., 190 (Dist. Ct., N. Dist. Ill., 1917). In this case the libelants sued for damages to a sailing vessel. The bridge was built in the winter of 1913-1914, and the libelants alleged it unreasonably obstructed navigation in that it offered a clearance of only 120 feet above water, so that the masts of the libelants' vessel were broken in passing under it. The respondents pleaded as a defense (1) that the bridge was authorized by the Secretary of War under the Act of

1899; and in case this should be held insufficient, they pleaded (2) that they had secured the State's consent to the bridge as well. The Court, following *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio, supra,* held the Federal permit by itself insufficient, but held the possession of permits from both governments a complete defense, saying (p. 192):

> "The Chicago river is wholly within the state of Illinois. In 1890 Congress assumed jurisdiction and control over the Chicago river for the purposes of commerce and navigation. The power to permit the construction of a bridge over the river still remains in the state of Illinois, or its municipal agents, but under Act Sept. 19, 1890, c. 907, §7, 26 Stat., 454, Congress having assumed control over the river a bridge could not be constructed until the proposed location and the plans therefor were first submitted to and approved by the Secretary of War in the interest of commerce and navigation. If the Secretary of War found that either the place or the plan of construction would unnecessarily obstruct commerce and navigation, he was in duty bound to withhold his approval, and the bridge could not be constructed notwithstanding the permit from the state. The state has the power to authorize the construction of the bridge; the Secretary of War had the power to permit or refuse to permit the bridge to be built, his discretion being controlled by the effect the proposed bridge would have upon commerce and navigation. It follows that two permits are essential to the construction of such bridges, one by the state, or its authorized agent, and the other by the United States government through the Secretary of War. *The respondents have secured both. The bridge was therefore duly authorized, and was a lawful structure.*" (Italics ours.)

Other cases decided subsequently to March 23, 1906, all of the same tenor as the preceding, are referred to

briefly in the margin.* See also *Stone* v. *Southern Illinois Bridge Co.*, 206 U. S., 267, 274 (1907), *post*, p. 71; *Hubbard* v. *Fort*, 188 Fed., 987 (1911), *ante*, p. 25.

In the case at bar, both Courts below cited the case of *People* v. *Hudson River Connecting Railroad Corporation*, 228 N. Y., 203 (1920), *certiorari* denied, 254 U. S., 631 (1920)—the District Court quoting at length from the opinion, the Circuit Court of Appeals contenting itself with a mere citation of it. Every portion of Judge ELKUS' opinion in this case quoted by the District Judge

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*In *City of Beaumont* v. *Texas & New Orleans R. Co.*, 296 Fed., 523, 526 (E. Dist. Tex., 1924), the Court said: "The statutes passed in execution of that power [commerce clause] provide that, where navigable waters lie wholly within a state, the authority to construct a bridge must be obtained from the state, and plans that illustrate the type and character of the bridge must be submitted to the Secretary of War and the Chief Engineer, whose approval makes the structure a lawful one."

In *Milwaukee* v. *Gimbel Bros.*, 130 Wis., 31, decided December 4, 1906, the Court stated that it had examined certain acts of Congress relating to the erection of structures in navigable waters, and announced as its conclusion regarding them that they "are merely restrictive of certain acts and, on their face, evince no purpose to exclude the States from prohibiting other acts within their borders as deemed necessary for public welfare and safety" (p. 35).

In *Pedrick* v. *Raleigh & Pamlico Sound R. R. Co.*, 143 N. C., 485, decided December 22, 1906, the Court said (p. 511): "It may be proper to say that we do not concur in the view pressed by defendant that the decision of the Secretary of War permitting the location of the bridge is conclusive. The control of its navigable waters is with the State, the authority of the General Government being only cumulative protection from an interference with commerce."

In *Kaw Valley Drainage District* v. *Missouri Pacific Ry. Co.*, 99 Kan., 188 (1916), the Court said (pp. 207-208): "Moreover, while Congress has jurisdiction over interstate commerce, and, with certain familiar exceptions, its control of such commerce is exclusive, yet Congress has expressly extended to the State a part of its regulatory power over bridges like the one in controversy [which was over waters the navigable portions of which were wholly within the State] * * * . This statute [Act of 1899, 30 Stat., 1151] is a specific recognition by Congress itself that notwithstanding its paramount jurisdiction of the means and instrumentalities of interstate commerce, the bridging of navigable waterways is likewise one of vital interest to the States, and that they also have a governmental concern as to proper bridging of such waterways."

In *People* v. *Metropolitan West Side Elevated Ry. Co.*, 285 Ill., 246 (1918), writ of error dismissed for want of jurisdiction, 252 U. S., 573 (1920), the Court said (p. 257): "The subsequent amendatory acts of Congress, including Section 18 of the Act of March, 1899, do not restrict or encroach upon the power the State had, previous to those enactments, been authorized to exercise. Conceding Congress has the power to take sole and exclusive jurisdiction over navigable waters wholly within a State, it has not done so."

was, it is submitted, *obiter dicta,* and quite unnecessary to the decision of the case. In the *Hudson River Connecting* case the State of New York sought to enjoin the construction of a bridge authorized by Congress and approved by the Secretary of War, the right to an injunction being based upon an alleged trepass upon land under water owned by the State. The Court said (p. 224):

> "Can the legislature of New York state interfere with the plenary power of Congress to authorize this bridge for interstate commerce by depriving the corporation, authorized and vested with a grant of franchise from Congress, of the power *intra vires* to avail itself of the franchise by subsequently imposing the penalty of injunction and forfeiture of its charter for exercise of the franchise? The answer must be in the negative."

The only holding in this case is that the State had not effectively substituted its veto for its previously given consent. In the first place the State was "not opposed to the construction of *a* bridge at the location selected" (p. 208). In the second place the State had affirmatively given consent to the construction of a bridge with more than one span at the point in question (Laws of New York, 1913, Chap. 388—the franchise conferred by this Act not being subject to a reserved right to amend, alter or repeal); thereafter the bridge was authorized by Act of Congress (38 Stat., 308) and plans approved by the Secretary of War. *It was only after such approval had occurred that the State attempted to withdraw its consent, but the withdrawal was by an act which was void as an impairment of the obligation of a contract.* The action of this Court in denying *certiorari* (254 U. S., 631) does not mean that this Court sanctioned

every holding in the case. As was said in the recent case of *United States* v. *Carver*, 260 U. S., 482, 490 (1923),

> "The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case, as the bar has been told many times."

The New York Court of Appeals had reached a clearly correct *result*. This Court, therefore, properly refused to busy itself with the correction of errors in *rationes decidendi*, the end reached being free from error. Moreover, it must not be overlooked that subsequently to the denial of *certiorari* in the *Hudson River Connecting* case this Court handed down its decision in *International Bridge Co.* v. *New York*, 254 U. S., 126 (1920), *ante*, p. 12, and in this decision *Cummings* v. *Chicago, supra*, and *Escanaba Company* v. *Chicago, supra*, were *cited as still having the force of authority.*

POINT III.

An intent to supersede State laws will not be imputed to Congress unless clearly manifested, and necessary to the attainment of the federal purpose.

The conclusion that the Act of 1906 *did not change the law*, and did not abolish the previous rule to the effect that concurrent authorization of State and Federal Governments is necessary in order to legalize the construction of a bridge over navigable waters wholly within the confines of a single State, is the only conclusion which we are permitted to reach, if we desire to avoid a conflict with the well known principle that a supersession of State laws will not be inferred unless the intent of Congress plainly appears, and unless supersession is necessary to the accomplishment of the purpose for which the Federal statute was passed.

The Supreme Court of the United States said in the case of *Illinois Central Railroad Co.* v. *Public Utilities Commission,* 245 U. S., 493, 510 (1918):

> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested. Reid v. Colorado, 187 U. S., 137, 148; Cummings v. Chicago, 188 U. S., 410, 430; Savage v. Jones, 225 U. S., 501; Missouri, Kansas & Texas Ry. Co. v. Harris, 234 U. S., 412, 419."

Another case of importance is *Savage* v. *Jones,* 225 U. S., 501 (1912), in which Mr. Justice HUGHES, writing for a unanimous Court, said (p. 533):

> "But the intent to supersede the exercise by the State of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other words, *such intent is not to be implied unless the act of Congress fairly interpreted is in actual conflict with the law of the State.* This principle has had abundant illustration [citing cases]." (Italics ours.)

And see *Gilbert* v. *Minnesota,* 254 U. S., 325, 331 (1920); *Whipple* v. *Martinson,* 256 U. S., 41, 45-46 (1921).

Now principles of statutory construction so fundamental and so often expressed as these must necessarily have been in the minds of the members of Congress when the Act of 1906 was under discussion. Certainly the Hon. Theodore E. Burton, the reputed author of the Act,* must have been cognizant of them. And yet

*"The Acts of 1899 and 1906 were drafted by Honorable Theodore E. Burton of Ohio, long the efficient chairman of the River and Harbor Committee of the House, and an eminent lawyer." 35 Harvard Law Review, 173 (1921).

why would Congress have left to elaboration by inference upon inference what, if really a result of this Act, is at once its most striking and far-reaching result? Why leave to attainment by elastic and extraordinary construction such a radical departure from the pre-existing law? When Congress has desired to annul State legislation, it has usually done so in unequivocal language—witness the Transportation Act, 1920, §407, sub-s. 6 (c) where, after providing for consolidations under orders to be issued by the Interstate Commerce Commission, Congress expressly said: "* * * thereupon such consolidation may be effected * * * *the law of any State or the decision or order of any State authority to the contrary notwithstanding*" (41 Stat., 482).

In *Hagan* v. *City of Richmond,* 104 Va., 723, 52 S. E., 385 (1905) the City of Richmond brought suit against Hagan to recover for the cost of removing by dynamite one of his barges which had sunk in the James River in such a way as to obstruct navigation. Hagan pleaded that the statute under which this suit was brought had been nullified by the River and Harbor Act of 1899. He also pleaded the Act limiting liability to the vessel itself and relieving the owner from personal liability (U. S. R. S., §4283). Judgment in favor of the City was reversed because the latter plea was sustained. In overruling the first defense, the Court said (p. 729):

> "If it had been the design of Congress to deprive the States of the important and essential right to police the rivers and harbors within their respective limits, it is inconceivable that it would have declared that purpose in language of doubtful import * * *. The object of the legislation is to keep the navigable waters of the United States clear and unobstructed; and supplemental legislation on the part of the States in furtherance of that design is in aid of commerce, and where not in conflict with any system adopted by Congress, is universally upheld."

This is in consonance with *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio, ante,* p. 31. It is also in harmony with the sentiments which this Court expressed in *County of Mobile* v. *Kimball,* 102 U. S., 691, 699 (1881), where it was said:

> "The control of Congress over them [navigable waters] is to insure freedom in their navigation, so far as that is essential to the exercise of its commercial power. *Such freedom is not encroached upon by the removal of obstructions to their navigability or by other legitimate improvement.* The States have as full control over their purely internal commerce as Congress has over commerce among the several States and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted *right to remove obstructions* from their harbors and rivers, deepen their channels, and improve them generally, if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government." (Italics ours.)

In *North Shore Boom Company* v. *Nicomen Boom Co.,* 212 U. S., 406 (1909), the plaintiff below obtained an injunction against the construction by the defendant of a log boom within the locality designated in the plat or survey for plaintiff's boom. The defendant sued out a writ of error upon the ground that there was a Federal question in the case—the question whether the obstruction did or did not contravene a Federal statute. The Federal statute legalized booms authorized by the State law; and as it was not denied that this boom was authorized by the State law, this Court properly held that no Federal question was involved. The opinion is of value for the statement (at p. 412) that obstructions in waters entirely within a State may be unlawful by State law, and if an Act of Congress also forbids them

they may contravene both laws—the inference being that subsequent congressional action does not supersede State law, but after congressional action the obstruction, to become lawful, must receive concurrent authorization of both State and Federal governments. The Court said (p. 412):

> "Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then there is a concurrent or joint jurisdiction of the state and National governments over the erection of a structure which obstructs navigation. *Cummings* v. *Chicago*, 188 U. S., 410; *Montgomery* v. *Portland*, 190 U. S., 89."

A case neatly illustrative of the principles which determine when supersession is to be inferred and when not, is *Missouri, Kansas & Texas Ry.* v. *Haber*, 169 U. S., 613 (1898). Actions were begun by Haber and others for damages caused by the act of the carrier in bringing into the State of Kansas, in violation of a state law, cattle suffering from splenetic fever. The shipment originated in Texas. The Federal Animal Industry Act (26 Stat., 1044, 1049) forbade the shipment in interstate commerce of cattle suffering from a contagious, infectious, or communicable disease, but expressly went on to say that splenetic fever, under certain circumstances, such as prevailed in the case then before the Court, should not be deemed such a disease. The carrier took the position that it could not lawfully have rejected the shipment, and that the Kansas law, in so far as it aimed to forbid what Congress permitted, had been superseded. But this Court held otherwise, pointing out that (p. 623):

> "The act of Congress did not assume to give any corporation, company or person the affirmative right to transport from one State to another State cattle that were liable to impart or capable of communicating contagious, infectious or communicable diseases."

The applicabilty of this observation to the case at bar is clear. Congress, by the Bridge Act of 1906 and the special acts relating to the proposed Newark Bay Bridge, did not give the defendant railroad an "affirmative right" to construct the bridge, but, as Congressman MANN said in the course of the debate referred to *ante*, p. 48, conceded that "the power to construct the bridges must be derived from the State itself."*

It follows that to the attainment of the Federal purpose, which is to aid navigation, a supersession of State laws, enacted to the same end, is not necessary.

POINT IV.

The construction of bridges over navigable waters is a matter requiring not a uniform rule but rather "that diversity which alone can meet the local necessities of navigation." *(Cooley* v. *Port Wardens.)*

We have pointed out (*ante*, p. 44) that the provisions of the Bridge Act of 1906, particularly when viewed in the light of its legislative history, do not show an intention to supersede State legislation and do not require for their efficient operation any judicial holding that State legislation has been impliedly superseded; on the contrary, the Act presupposes the continuing existence of valid State legislation as the source of the affirmative power to build such bridges, Congress merely reserving the right to nullify a State license when such action is deemed necessary to preserve the navigability of a particular river (*ante*, pp. 46 and 57). To require anyone who proposes to obstruct a navigable stream wholly within the confines of a single State, to jump a double hurdle and secure the concurrent authorization of State

*See Point I, *supra*.

and Federal governments, is to promote, and not to thwart, the Federal purpose.

With the foregoing in mind, we approach the following pronouncement of this Court in the *Pilotage* case, *Cooley* v. *Board of Wardens of the Port of Philadelphia*, 12 How., 299, 319 (1851):

> "Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity, which alone can meet the local necessities of navigation."

To the question which is propounded by the alternative classification suggested in the passage just quoted, we unhesitatingly answer that the case of bridges is a case *par excellence* for the recognition of "that diversity which alone can meet the local necessities of navigation." And nowhere has this been given fuller effect than in the decision of this Court in *Escanaba Company* v. *Chicago*, 107 U. S., 678, 683 (1882), where Mr. Justice FIELD, writing for a unanimous court, said:

> "But the States have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and *it can generally be exercised more wisely by the States than by a distant authority.* They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. Illinois is more immediately affected by the bridges over the Chicago River and its branches than any other State, and is more directly concerned for the prosperity of the city of Chicago, for the convenience and com-

> fort of its inhabitants, and the growth of its commerce. And nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the State, or the authorities of the city upon whom it has devolved that duty. When its power is exercised, so as to unnecessarily obstruct the navigation of the river or its branches, *Congress may interfere and remove the obstruction.* If the power of the State and that of the Federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the State over bridges across its navigable streams is plenary." (Italics ours.)

The ferry cases present a ready analogy. As was observed in *Gilman* v. *Philadelphia,* 3 Wallace, 713, 726 (1865):

> "Bridges are of the same nature with ferries, and are undoubtedly within the category thus laid down."

Among the more recent ferry cases is *Port Richmond and Bergen Point Ferry Co.* v. *Hudson County,* 234 U. S., 317 (1914), where this Court upheld the power of the defendant-in-error to fix rates on an interstate ferry. The Court said:

> "Coming then to the question now presented —whether a State may fix reasonable rates for ferriage from its shore to the shore of another State,—regard must be had to the basic principle involved. That principle is, as repeatedly declared, that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive; that, in other matters, admitting of diversity of treatment according to the special requirements of local conditions, the States may act within their respective jurisdictions until Congress sees fit to act; and

that, when Congress does act, the exercise of its authority overrides all conflicting state legislation [p. 330].

* * * * * * *

"It is argued that the mere fact that interstate transportation is involved is sufficient to defeat the local regulation of rates because, it is said, that it amounts to a regulation of interstate commerce. But this would not be deemed a sufficient ground for invalidating the local action without considering the nature of the regulation and the special subject to which it relates. Quarantine and pilotage regulations may be said to be quite as direct in their operation, but they are not obnoxious when not in conflict with Federal rules. The fundamental test, to which we have referred, must be applied; and the question is whether, with regard to rates, there is any inherent necessity for a single regulatory power over these numerous ferries across boundary streams; whether, in view of the character of the subject and the variety of regulation required, it is one which demands the exclusion of local authority. Upon this question, we can entertain no doubt. It is true that in the case of a given ferry between two States there might be a difference in the charge for ferriage from one side as compared with that for ferriage from the other. But this does not alter the aspect of the subject. The question is still one with respect to a *ferry* which necessarily implies transportation for a short distance, almost invariably between two points only, and unrelated to other transportation. It thus presents a situation essentially local requiring regulation according to local conditions" (pp. 331-332).

We are aware that the Court excluded from the scope of its language ferries "operated in connection with railroads, and cases, if any, where the ferriage is part of a longer and more continuous transportation" (p. 331). But is is submitted that a bridge does not lose its local character simply because it is used to carry interstate

commerce. It operates just as much as an obstruction to navigation whether it is used in interstate commerce or not. If a State can abolish grade crossings on an interstate railroad (*Erie R. R.* v. *Public Utilities Comm. of N. J.*, 254 U. S., 394 [1921])—a power, by the way, which this Court was careful to leave unaspersed in *Railroad Comm. of California* v. *Southern Pacific Co.*, 264 U. S., 331, 341 [1924])—it would seem equally reasonable to concede to it the power to prevent the obstruction of a navigable river by a bridge used in interstate commerce. And the existence of that power was admitted in *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, *ante*, p. 31.

See to the same effect as the *Port Richmond Ferry* case the case of *Wilmington Transportation Co.* v. *R. R. Comm. of California*, 236 U. S., 151, 154 (1915).

In *Huse* v. *Glover*, 119 U. S., 543, 548-549 (1886), the Court said:

> "The State is interested in the domestic as well as in the inter-state and foreign commerce conducted on the Illinois River, and to increase its facilities, and thus augment its growth, it has full power. *It is only when, in the judgment of Congress, its action is deemed to encroach upon the navigation of the river as a means of interstate and foreign commerce, that that body may interfere and control or supersede it.* * * * How the highways of a State, whether on land or water, shall be best improved for the public good *is a matter for State determination*, subject always to the right of Congress to interpose in the cases mentioned." (Italics ours.)

In thus contending for a rule which will substitute for uniformity a diversity adapted to the local necessities of navigation, we are not running counter to any canon of construction adopted by this Court in constitutional cases. For, as was observed by this Court in *Hammer* v. *Dagenhart*, 247 U. S., 251 (1918):

> "Many causes may co-operate to give one State, by reason of local laws or conditions, an economic advantage over others. The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions [p. 273].
>
> * * * * * * *
>
> "The maintenance of the authority of the States over matters purely local is as essential to the preservation of our institutions as is the conservation of the supremacy of the federal power in all matters entrusted to the Nation by the Federal Constitution" (p. 275).

And in the *Passenger Cases*, 7 Howard, 283, 428-429 (1848), Mr. Justice WAYNE, in his concurring opinion, said:

> "That is a very narrow view of the constitution which supposes that any political sovereign right given by it can be exercised, or was meant to be used, by the United States in such a way as to dissolve or even disquiet, the fundamental organization of either of the States. The constitution is to be interpreted by what was the condition of the parties to it when it was formed, by their object and purpose in forming it, and by the actual recognition in it of the dissimilar institutions of the States. The exercise of constitutional power by the United States, or the consequences of its exercise, are not to be concluded by the summary logic of *ifs* and syllogisms."

Summarizing the jurisprudence of the last two decades of the nineteenth century and its tendency to sanction the centralization of power in the Federal Government, Charles Warren in his *The Supreme Court in United States History*, Vol. III, p. 353, reaches this conclusion:

> "In fact, there was substantially but one class of cases affecting interstate commerce in which the State powers were upheld, namely those involving the right of the State to control its bridges, wharves and ferries."

POINT V.

The construction of the Act of 1906 contended for by the Appellants is the only one consistent with the Constitution.

To hold that the States must still be appealed to for their consent to bridges over waters whose navigable portions are wholly within their confines, is, we submit, to give the Act of 1906 a construction which is so clearly in furtherance of the intent of Congress, and which makes such a strong appeal to both reason and logic, as to render superfluous any extended demonstration of the constitutional doubts and difficulties which would inevitably arise were a contrary construction allowed to prevail. These doubts and difficulties arise from three fundamental propositions:

1. The nature of local, or State, sovereignty in lands under water.

A nexus of real significance between the bridge and the State and an additional ground for State control, are found in the circumstance (adverted to *ante,* pp. 16, 18 and 19), that the State owns the land under water on which the proposed bridge is to rest. To uphold the unpermitted and uncompensated taking of State lands is to ignore the basic rule that:

> "A man cannot acquire a right to property by his desire to use it in commerce among the States." *Hudson County Water Co.* v. *McCarter,* 209 U. S., 349, 357 (1908).

In this case, a New Jersey statute (L. 1905, c. 238) made it unlawful for anyone to transport by pipe lines the water of any fresh water lake or river of New Jersey

into any other State for use therein. Under this statute, the State Attorney General obtained an injunction which restrained the plaintiff-in-error from carrying out a contract to supply water for Staten Island, N. Y., by means of a main starting in Bayonne, N. J. The plaintiff-in-error's assertion that the statute unduly burdened interstate commerce was rejected in this court. Mr. Justice HOLMES, writing for eight of the Justices, said (pp. 356-357):

> "The problems of irrigation have no place here. Leaving them on one side, it appears to us that few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished, except by such drafts upon them as the guardian of the public welfare may permit for the purpose of turning them to a more perfect use. This public interest is omnipresent wherever there is a State, and grows more pressing as population grows. It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. Whether it be said that such an interest justifies the cutting down by statute, without compensation, in the exercise of the police power, of what otherwise would be private rights of property, or that apart from statute those rights do not go to the height of what the defendant seeks to do, the result is the same. But we agree with the New Jersey courts, and think it quite beyond any rational view of riparian rights that an agreement, of no matter what private owners, could sanction the diversion of an important stream outside the boundaries of the State in which it flows. The private right to appropriate is subject not only to the rights of lower owners but to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

> "We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. The legal conception of the necessary is apt to be confined to somewhat rudimentary wants, and there are benefits from a great river that might escape a lawyer's view. But the State is not required to submit even to an aesthetic analysis. Any analysis may be inadequate. It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will."

To concede to Congress the power to impose obstructions over navigable waters wholly within one State in a case where, as here, the State itself has title to the lands under water on which the obstruction is to be built, is to deprive the States of the power of regulating and conditioning the use of such lands, and to transfer that power to the United States. Yet in an early case in which such an extension of federal power was contended for, this Court flatly rejected the contention. See *Pollard's Lessee* v. *Hagan*, 3 Howard, 212 (1844), holding a patent from the federal government to lands under water in Alabama insufficient to support an action of ejectment. The Court said (p. 230):

> "* * * *This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it.* To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a

> numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the constitution of the United States, 'and the laws which shall be made in pursuance thereof.'
>
> "By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters, and the soils under them, were not granted by the constitution to the United States, but were reserved to the States respectively * * *." (Italics ours.)

This case was followed and its principle applied in *Shively* v. *Bowlby,* 152 U. S., 1, 48-50 (1894). The same doctrine was expressed in slightly different language in *Van Brocklin* v. *Tennessee,* 117 U. S., 151, 168 (1886), as follows:

> "The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high water mark, vest in the State, and not in the United States."

It follows from the preceding that the United States cannot impose its will on the State*, and that the latter's right to prohibit obstructions for which its consent has not been secured is an incident of its sovereignty. See *Weber* v. *Harbor Commissioners,* 18 Wallace, 57, 65 (1873), where the Court said:

> "By that law [the common law] the title to the shore of the sea, and of the arms of the sea, and in the soils under tidewaters is, in England, in the king, and, in this country, in the State. Any

*Cf. opinion of the Judge-Advocate General, *ante*, p. 20.

> erection thereon without license is, therefore, deemed an encroachment upon the property of the sovereign, or, as it is termed in the language of the law, a purpresture, which he may remove at pleasure, whether it tend to obstruct navigation or otherwise."

In *Kansas* v. *Colorado,* 206 U. S., 46 (1907), the complainant sought to enjoin a diversion of water by the defendant, a State situated upstream from the complainant. The United States intervened and asserted a right in the water superior to either State, for the purpose of reclaiming arid public lands.* The Court, after an exhaustive inquiry into the origin and purpose of the Tenth Amendment (p. 90), dismissed the crossbill of the United States on the ground (p. 93) that "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters," and that whether the common law rule or a modified form thereof prevalent in the western states be adopted by any particular State, it is still true (p. 94) that "Congress cannot enforce either rule upon any State."

In *Alabama Power Co.* v. *Gulf Power Co.,* 283 Fed., 606 (M. Dist. Ala., 1922), in which the constitutionality of the Federal Water Power Act (41 Stat., 1063) was upheld, Judge CLAYTON wrote a comprehensive opinion and examined numerous decisions of this Court. As to federal rights in lands under water, he said (p. 612):

> "Of course, at the time the states formed themselves into a more perfect union under the Constitution, they held the right to their own navigable waters and the beds under them, with the power to use or dispose of them without substantial impairment of the interest of the public in such waters, and the absolute property in and dominion over navigable streams, tidewaters, and

*And not for the purpose of preserving navigability, as in the *Rio Grande* case, *ante*, p. 38.

> the underlying soils were not granted to the general government, but were reserved and now remain in the states or under state sovereignty. * * *"

2. The power of Congress over navigable waters is limited to their improvement for purposes of navigation, including the *removal* of obstructions.

The decisions of this Court sanction but one limitation upon the State's title to land under water. Thus, in *Port of Seattle* v. *Oregon & Washington R. R. Co.*, 255 U. S., 56, 63 (1921), Mr. Justice BRANDEIS, writing for a unanimous court, said:

> "The right of the United States in the navigable waters within the several states is limited to the control thereof for purposes of navigation."

And see other cases to substantially the same effect collected in Judge SANBORN's opinion in *United States* v. *Holt State Bank*, 294 Fed., 161, 164 (C. C. A., 8th Circ., 1923).

The point involved in the *Port of Seattle* case was the nature of a State grant of lands under water lying between the United States pierhead line and the waterway boundary, or bulkhead line, as fixed by the State. The State laws provided for the issuance of licenses for the improvement of lands so situated, but the defendant, or parties in privity with it (who were littoral owners), had erected wharves upon them without license. The Port of Seattle, under State authorization, brought a bill in equity to quiet the State's title to lands thus appropriated. This Court held (1) that the establishment of the pierhead line by the United States did not divest the State's title to land under water between such pierhead line and the bulkhead line; (2) that under State

law a grant of littoral lands carried no title to land below high water mark; (3) that it makes no difference whether the lands acquired by grant from the State are tide lands or not; (4) that it likewise makes no difference whether the waterway is natural or artificial, and in connection with this holding the Court said (p. 69):

> "So far as the pierhead lines are concerned, the Railroad concedes that their establishment by the United States did not create as against the State a right to wharf out. They merely fixed the line beyond which piers might not extend."

The case, therefore, is a distinct authority for the proposition that federal legislation concerning navigable waters does not supersede State legislation on the same subject, and that the intent of Congress was

> "simply to create an additional and cumulative remedy to prevent such structures, although lawfully authorized, from interfering with commerce." *Lake Shore & Michigan Southern Ry. Co.* v. *Ohio*, *ante*, p. 32.

In *Stone* v. *Southern Illinois Bridge Co.*, 206 U. S., 267, 274 (1907), Mr. Justice Day, writing for a unanimous Court, said:

> "Federal control of bridges constructed over navigable waters is maintained because of the right to prevent obstructions to navigation and preserve such public highways as rivers for free and unobstructed use in the interest of commerce."

In *Gibson* v. *United States*, 166 U. S., 269, 271-272 (1897), the Court said:

> "All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various

> States and individual owners under them, it is always subject to the *servitude in respect of navigation* created in favor of the Federal government by the Constitution." (Italics ours.)

In *United States* v. *Rio Grande Irrigation Company*, 174 U. S., 690, 708 (1899), the Court said:

> "Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question [30 Stat., 1121]."

In *Willink* v. *United States*, 240 U. S., 572, 580 (1916), the same principle was thus restated:

> "The river being navigable and tidal, whatever rights he [appellant's testator] possessed in the land below the mean high-water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed [citing cases]."

See also *Huse* v. *Glover*, *ante*, p. 63.

It is something more than a coincidence that in two comparatively recent instances of congressional legislation affecting rivers, there has been a conscious endeavor on the part of Congress to connect the legislation with the *improvement of navigation*, a cogent admission on the part of the national legislature that its power over rivers and their beds does not extend beyond this. Thus, in *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U. S., 53, 72-73 (1913), Mr. Justice LURTON said concerning an act for the repair, maintenance and preserva-

tion of certain public works at Sault Ste. Marie (35 Stat., 815):

> "But aside from the exclusive public purpose declared by the eleventh section of the act, the twelfth section declares that the conservation of the flow of the river is 'primarily for the benefit of navigation, and incidentally for the purpose of having the water power developed, either for the direct use of the United States, or by lease * * * through the Secretary of War.' If the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government."

And in *Alabama Power Co.* v. *Gulf Power Co.*, 283 Fed., 606, 617 (M. Dist. Ala., 1922), the Court (CLAYTON, D. J.) said concerning the Federal Water Power Act, 41 Stat., 1063:

> "Sections 19 and 27 of the act evidence the intention of Congress, while asserting the federal power, to carefully respect the reserved power of the states. These two sections are manifestly the result of a compromise on the part of those Senators and Representatives who held the broadest view of congressional power over the subject and those of their associates most pronounced in desiring to safeguard the rights of the states. But nevertheless the purposes are the improvement and use of navigable streams for commerce, and, incidentally, the subservient use of the superabundant water at the dams for generating power, and in the same connection the intention was to negative the charge of federal usurpation and to distinctly recognize the rights of the state in navigable streams; * * *."

But to his analysis of the nature of the federal paramountcy established by the commerce clause, the learned Judge added this qualification:

> "It is also a settled doctrine that the power of Congress over navigable streams is limited to the protection and improvement of them in the interests of commerce—navigation. * * * Admittedly the federal government can take property necessary for the improvement of the navigability of navigable streams, * * *."

And so citations might be multiplied indefinitely. In no case has this Court perverted a control over navigable rivers, assumed to preserve their navigability, into a power to obstruct navigation against the wishes of the local authorities and in a manner calculated to handicap forever the development, as a port, of the chief city of the State in which the river lies.

3. The failure of Congress to make any provision for just compensation makes it impossible to argue that there has been a valid exercise of the power of eminent domain in the case at bar.

We have already (*ante*, p. 16) adverted to an expression in the opinion of the Court below (Rec., p. 109) which amounts to an implicit holding that the United States had exercised the power of eminent domain in the case at bar. But, surely, if the acts of Congress relating to the proposed Newark Bay Bridge did constitute an exercise of the power of eminent domain on the part of the United States, they are void because they fail to provide for reasonable compensation to the owner of the property taken. As was observed in *Sweet* v. *Rechel*, 159 U. S., 380, 399 (1895):

> "When, however, the legislature provides for the actual taking and appropriation of private property for public uses, its authority to enact such a regulation rests upon its right of eminent domain—a right vital to the existence and safety of government. But it is a condition precedent to

> the exercise of such power that the statute make provision for reasonable compensation to the owner."

Certainly the Fifth Amendment must be held to accord to a sovereign State at least as great protection against the confiscation of its property as is accorded to the citizens of such State. Hence we may properly say that a State is a "person" entitled to the protection of the Fifth Amendment. Cf. *Georgia* v. *Chattanooga*, 264 U. S., 472, 484 (1924). And it is also clear that Congress, in exercising power under the commerce clause, may only do so in subordination to the rights of persons under the Fifth Amendment. Thus in *Monongahela Navigation Co.* v. *United States*, 148 U. S., 312, 336 (1893), the Court said:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * * ."

And in *United States* v. *Lynah*, 188 U. S., 445, 471 (1903), the Court said:

> "Passing to the third question, it is contended that what was done by the government was done in improving the navigability of a navigable river, that it is given by the Constitution full control over such improvements, and that if in doing any work therefor injury results to riparian proprietors or others it is an injury which is purely consequential, and for which the Government is not liable. But if any one proposition can be considered as settled by the decisions of this court it is that, although in the discharge of its duties the government may appropriate property, it cannot do so without being liable to the obligation cast by the Fifth Amendment of paying just compensation."

The two cases last cited were cited and followed in *United States* v. *Cress*, 243 U. S., 316, 320 (1917).

To *Hammer* v. *Dagenhart*, 247 U. S., 251 (1918), wherein the first Child Labor Act (39 Stat., 675) was adjudged unconstitutional, a brief reference will suffice. The Court's conclusion was:

> "Thus the act in a twofold sense is repugnant to the Constitution. It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend" (p. 276).

The principle followed in reaching this result is succinctly stated at page 274:

> "The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to the States in the Tenth Amendment to the Constitution."

In view, therefore, of the extreme likelihood of conflict with the Fifth and Tenth Amendments if the Act of 1906 were construed otherwise than as contended for in Point II, we are in a position to urge as an additional reason for adopting that construction the rule that

> "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States* v. *Delaware & Hudson Co.*, 213 U. S., 366, 408 (1909); *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S., 204, 217 (1922).

POINT VI.

The Special Acts of 1919 and 1921 show no intention of dispensing with the necessity of State approval and must be construed as merely granting Federal consent without impairing State powers.

The Special Acts of 1919 and 1921 (Appendix, *post*, pp. 107-108) purport to grant authority to the railroad company to construct the bridge in accordance with the provisions of the Bridge Act of 1906. There cannot possibly be gathered from these bills themselves any Congressional intention to override State laws on the subject, for the Act of 1919 is in the precise form recommended for future bridge bills by the House Committee when the Bridge Act of 1906 was under consideration (*ante*, p. 47). It would be absurd to contend that Congress intended to attach any new meaning to the form used beyond that explained by the House Committee when the form was devised by it in 1906. That meaning, as appears from the legislative history of the Bridge Act, was merely a consent by the United States, a granting of one half of the concurrent power necessary to be exercised before the bridge might be lawfully constructed.

In perhaps the majority of instances in which the word "authority" is employed in an Act of Congress, as it was in the Special Act of 1919, it is used in this sense of "approval" or "consent." We need go no further than the Act of 1899, which we have considered, *supra*, p. 39, for clear examples of this use. Section 10 of the Act (Appendix, *post*, p. 97) reads:

> "That the creation of any obstruction not *affirmatively authorized* by Congress, to the navigable capacity of any of the waters of the United

> States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf * * * in any port * * * or other water of the United States * * * except on plans recommended by the Chief of Engineers and *authorized* by the Secretary of War; and it shall not be lawful to excavate or fill * * * any port * * * of the United States, unless the work has been recommended by the Chief of Engineers and *authorized* by the Secretary of War prior to beginning the same." (Italics ours.)

The meaning of the word "authorize" in the section just quoted was the principal question in *Hubbard* v. *Fort* (*ante*, p. 25), where Judge RELLSTAB said (188 Fed., at pp. 993-997):

> "This section was construed in Cobb v. Lincoln Park, 202 Ill., 427, and Wilson v. Hudson County Water Co., 76 N. J. Eq., 543 (the defendant in the last case being the Water Company in the case at bar, and the question there considered being the same as raised here). In both of these it was held that the Secretary of War's *authorization* was a mere license to do the work and not a grant of power to do it.
>
> * * * * * * * *
>
> "It is further contended, however, that the construction thus placed upon section 10 of the act of 1899 is erroneous, and that, first, unless such section be so construed as to empower the Secretary of War to authorize the excavation and filling, etc., of interstate waters in the first instance without resort to Congress, violence will be done to the word 'authorize' as used in that section, in view of the use by Congress of the word 'approve' in section 9, where permission only was intended to be expressed;
>
> * * * * * * * *
>
> "The use of the word 'authorize' instead of 'approve' does not change the Secretary of War's

> act from permissory to plenary. Two of the definitions of the word 'authorize' are to approve of; to *formally sanction.* Cent. Dict. & Cyc." (Italics ours.)*

Furthermore, the use of the expression "affirmatively authorized" in Section 10 of the Act of 1899 is a plain recognition of the other or negative sort of authority, equivalent to consent or approval. When the word "authority" is employed to mean a grant of power rather than a mere license, it is common to couple with it an adjective such as "affirmative," "primary" or "plenary."

The contention of appellee that when Congress used the word "authority" in the Special Act of 1919, it intended to change the law which had existed from the beginning of the government giving to the States control over bridges across navigable intrastate waters, and to take the power over this bridge to itself to the exclusion of the State of New Jersey, is directly answered by the following statement in Judge RELLSTAB's opinion (188 Fed., at p. 997):

> "Something more than a mere change of expression, particularly when the different word is not different in all its meanings, is therefore necessary to show a legislative intent to effect a so radically different purpose."

It is inconceivable that such a sweeping change in the law in regard to navigable waters should have been made thus casually. The Special Acts of 1919 and 1921 were routine legislative business, and framed in the routine wording used ever since 1906.

All that we have said with respect to the constitutional questions involved in the construction of the Bridge Act applies equally to the Special Acts if taken alone.

The Bridge Act of 1906 is the statute to which the appellee railroad must point for its right to disregard New Jersey law, unless this Court is to be asked to shut its

*This is in full accord with the language employed by the Supreme Court in the *Lake Shore* case, *ante*, p. 18.

eyes to the source of the Special Acts, and to read into them a Congressional purpose, which obviously never existed, to exert a plenary power never before attempted to be exercised. The Court below recognized this when it said of the Bridge Act (Rec., p. 107):

> "This is the general bridge act under the authority of which all bridges have since its passage been built. Subsequent acts authorize the construction of particular bridges in accordance with the general provisions of this Act * * * ."

We have already shown (*ante*, pp. 44, 46-48, 55-56; see also *post*, p. 92) that in all the discussion preceding the passage of the Act of 1906, whether in the committee room, at the War Department, or on the floor of Congress, no one ever even referred to what, if appellee's contention is correct, would be the one outstanding, memorable feature of that Act.

If Congress had had the purpose by the Act of 1906 to strip the States of their power over navigable waters wholly within the limits of a single State, it would certainly have expressed itself differently and less ambiguously. Instead of saying in the negative, "that when, hereafter, authority is granted by Congress" to construct a bridge, such bridge "shall *not* be built * * * until the plans * * * have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plan," it would naturally have expressed itself in the positive to the effect that bridges, etc., may hereafter be built over any of the navigable waters of the United States under authority of Congress, upon the approval of the plans by the Secretary of War, etc. And in all probability it would have distinctly said that it was meant to include intrastate as well as interstate waters, or would have added a clause expressly dispensing with the necessity of State authority as pointed out in Point III, *supra*. And if Congress had intended by the Special Acts to override an existing law of the State of New Jersey it would have used some

language evincing that intention, rather than the stereotyped form of special bridge act.

It is submitted that none of the Acts "manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States" (*Cummings* v. *Chicago*, 188 U. S., 410, 431 [1903]).

POINT VII.

Congress, by creating and adopting as its instrumentality the Port of New York Authority, qualified the license granted to the Central Railroad Company of New Jersey by imposing, as an additional requirement, the approval of that body.

Both the Bridge Act of 1906 and the special acts relating to the proposed Newark Bay Bridge (41 Stat., 277, 1099) must be read in the light of the later joint resolutions concerning the Port of New York District (42 Stat., 174, 822, passed respectively August 23, 1921, and July 1, 1922).

In the preamble to the resolution of August 23, 1921, Congress declared, *inter alia:*

> "Whereas since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and
>
> "Whereas it is confidently believed that a better coordination of the terminal, transportation, and other facilities of commerce in, about, and through the port of New York will result in great economies, benefiting the Nation as well as the States of New York and New Jersey; * * *."

By the Joint Resolution of July 1, 1922 (42 Stat., 822) the Congress of the United States approved the

comprehensive plan of the Port Authority which it had theretofore authorized to be made (42 Stat., 174) and stated:

> "The Port of New York Authority is hereby authorized and empowered to carry out and effectuate the same."

That the words "authorized and empowered" were not used by Congress in the sense of giving consent only, is clearly shown by the fact that when the resolution of July 1, 1922, was up for debate in the House, a motion was made by Representative Montague of Virginia (Congressional Record, 67th Cong., 2nd Session, Vol. 62, pp. 7976-7977) to strike out the words "authorized and empowered" and insert "the consent of Congress is hereby given to the * * *," but the proposal failed to pass.

These Joint Resolutions were framed after extensive inquiry, unusual study and full debate. As Chief Justice MARSHALL said of the Act incorporating the Second Bank of the United States, these measures "did not steal upon an unsuspecting legislature, and pass unobserved." *M'Culloch* v. *Maryland*, 4 Wheaton, 316, 402 (1819).

It is alleged in the Complaint (Rec., p. 20) that the construction of the proposed bridge is in conflict with, obstructive of and inimical to the comprehensive plan. This is an allegation of fact which stands admitted by the motion to dismiss. *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924).

Only a greatly diminished benefit would result from the Resolution, therefore, if after an express plan had been formulated, railroads operating in the District subject to the Port Authority were permitted to erect bridges, etc., in accordance with the pre-existing rules, which provided for no submission to any coordinating

body whatsoever. The preambles emphasize the need of coordination. We need not inquire into what would be the effect of a licensing act such as 41 Stat., 277, *passed after* August 23, 1921; it is clear that the state of the law upon the adoption of the Joint Resolution of August 23, 1921, is that no bridge over navigable waters in the Port of New York District can lawfully be constructed unless the consent of the Port of New York Authority, or of the State where the bridge is to be built, is obtained.

The rule that a statute should be so construed as to avoid an unconstitutional divestment of vested rights cannot be urged against this construction, for it must yield before the rule that grants of special franchises are strictly construed in favor of the public right. This doctrine has frequently been applied specifically in the case of bridges. Thus in *Bridge Co.* v. *United States,* 105 U. S., 470, 480 (1881), this Court in upholding the right of Congress to exercise its reserved power to amend the statute authorizing the bridge by compelling the Railway Company to change the structure of the bridge so as to lessen the obstruction of navigation, said:

> "* * * Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered, unless it was manifestly so intended. Every doubt should be resolved in favor of the Government. * * * In the present case the reservation is of power to withdraw the assent which was given, and to direct the necessary modifications and alterations. This was to be done in case the free navigation of the river

> should at any time be substantially and materially obstructed under the authority which was granted. It was originally a proper subject of legislative inquiry whether the resolution made sufficient provision for the protection of commerce."

See to the same effect, *Louisville Bridge Co.* v. *United States,* 242 U. S., 409, 417 (1917), where the same general principle was couched in the following language:

> "* * * Clearly, the acts were passed under the power of Congress, to regulate commerce. That power is a very great power, and in its nature continuing, not being exhausted by any particular exercise. We need not go so far as to say that Congress could not in any case by contract or estoppel prevent itself from modifying or revoking a regulation once made and substituting another in its place without compensation. But when private rights of an indefeasible nature are sought to be derived from regulatory provisions established in the exercise of this power, the case is peculiarly one for the application of the universal rule that grants of special franchises and privileges are to be strictly construed in favor of the public rights, and nothing is to be taken as granted concerning which any reasonable doubt may be raised."

A word as to the proviso in the Joint Resolution (42 Stat., 180) "That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." This proviso must be so construed as not to defeat the purpose of the Joint Resolution. The proviso is intended to preserve the federal paramountcy which takes the form of a power to abolish obstructions licensed by a State and to require the approval of the Secretary of War before certain bridges authorized by the State

may be built; the proviso is also intended to preserve to Congress the right by affirmative action thereafter taken to alter the extent of the concession and to provide for alterations in the comprehensive plan, amounting possibly to its abolition. The proviso is essentially designed to maintain the *status quo* by keeping the existing federal power intact; it is not the purpose of the proviso to enlarge the federal power. It could only do that by superseding existing state laws, and "its purpose to do so" must be "clearly manifested." *Illinois Central R. R. Co.* v. *Public Utilities Commission, ante,* p. 55.

SUMMARY.

The appellants most earnestly point out that in maintaining that the proposed bridge (being over navigable waters wholly within one State) cannot lawfully be erected until the State's authorization is procured, they are supported by deliberate rulings of all three branches of the Government, viz.:

> *The legislative:* "The power to construct the bridges must be derived from the State itself." Congressman Mann, speaking for the Committee on Interstate and Foreign Commerce, *ante,* p. 48.
>
> *The executive:* "The fact is that without the requisite State authority it [the approval of the Secretary of War] is ineffectual." The Judge-Advocate General, *ante,* p. 20.
>
> *The judicial:* "The act does not make Congress the source of the right to build but assumes that the right comes from another source, that is, the State." *International Bridge Company* v. *New York,* 254 U. S., 126, 133, *ante,* p. 15.

As the obstruction of a navigable water may be attended by serious local damage, the soundest possible rule of decision is that it requires the combined authority of State and Federal Governments to *impose* an ob-

struction, but the single authority of Congress to *remove* one.

We contend that the Special Acts of 1919 and 1921 clearly rest for their interpretation upon the Bridge Act of 1906; that the Congressional intent as regards the supersession of State laws by the Bridge Act of 1906 is that such supersession should be confined to State laws sanctioning obstructions which Congress has refused to sanction, and should not be extended to State laws whose purpose is to aid navigation by restricting the creation of obstructions. The burden of Mr. Mann's complaint in giving, as Committee Chairman, an explanation to a fellow-Congressman of the evils at which the 1906 Bridge Bill was aimed, was the too frequent erection without federal approval of bridges interfering with navigation.*

It was error, therefore, for the Courts below so to construe the Act of 1906 and the Special Acts of 1919 and 1921 as to make the permit from the Secretary of War (issued under Congressional authority) virtually a sword with which to flout State sovereignty, instead of regarding it as a mere shield against federal prosecution; and it was error to ignore the Joint Resolutions relating to the Port of New York Authority, and to hold the defendant railroad's conduct lawful though utterly subversive of the Congressional program of co-ordination. Only by a reversal of the decree appealed from can this Court carry out the legislative intent to give in 1906 renewed vitality to the criteria in the Act of 1899, and, by leaving them unaltered, to retain concurrent authorization of bridges by Federal

*"I may say to the gentleman that up to within a few years ago there was no Federal control over the matter of building bridges over streams, and the result was that until Congress assumed control of that matter it became a common thing to erect bridges which did interfere with navigation, and all over the country there are now bridges which do interfere with navigation, put there before Congress prohibited that" (40 Cong. Rec., 1717; for further excerpts from the debate, see Appendix, *post*, pp. 92-95).

and State Governments as an indispensable prerequisite to their legality. And only by such reversal can this Court fully perform its supreme duty

> "to preserve inviolate the constitutional limitations upon the exercise of authority, federal and state, to the end that each may continue to discharge, harmoniously with the other, the duties entrusted to it by the Constitution." *Hammer* v. *Dagenhart*, 247 U. S., 251, 276 (1918).

CONCLUSION.

The final decree appealed from should be reversed with costs, and the cause remanded with directions to reinstate the complaint and proceed to a determination of the controversy upon the merits.

Dated, Newark, N. J., October 10, 1924.

Respectfully submitted,

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EDWARD L. KATZENBACH,
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Appendix.

1. Report No. 182, 59th Congress, 1st Session.

REGULATION OF CONSTRUCTION OF BRIDGES OVER NAVIGABLE WATERS.

JANUARY 11, 1906.—Referred to the House Calendar and ordered to be printed.

MR. WANGER, from the Committee on Interstate and Foreign Commerce, submitted the following

REPORT

[To accompany H. R. 6009.]

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (H. R. 6009) to regulate the construction of bridges over navigable waters, beg leave to report the said bill back with sundry amendments.

A similar bill was reported from this committee, with a favorable recommendation, February 24, 1905, and was passed by the House but too late in the session to receive consideration in the Senate. The bill has the approval of the Secretary of War and the Chief of Engineers, as appears by the indorsements made a part of this report.

The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress. A further purpose is to prevent the cumbering up of the statute books by repeating in each bridge bill the same provisions, and also to shorten the time for considering and reading bridge bills in the two Houses of Congress. Under the practice now in force the Committee on Interstate and Foreign Commerce of the House and the Committee on Commerce of the Senate, having jurisdiction of

bridge bills, require the insertion in each bill of certain provisions. These provisions make the bill long, take up the time of the two Houses of Congress in the reading of them, and add to the length of the laws when enacted. [Italics ours.]

The present bill gathers these provisions into one general law, so that hereafter a bill to authorize the construction of a bridge may be in form similar to the following:

> A BILL to authorize John Doe Railroad Company to construct a bridge across the Richard Roe River, at or near Black Acre.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the John Doe Railroad Company, its successors and assigns, be, and they are hereby, authorized to construct, maintain and operate a bridge across the Richard Roe River, at or near Black Acre, in the State of ——, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, nineteen hundred and ——.'

Of course Congress will have the authority in any special bill to put in special or general provisions, and that may be properly done when there arises some special occasion calling for the exercise of such authority.

Under existing law no bridge is authorized to be built without first receiving authority from Congress, over any of the navigable waters of the United States *which do not lie wholly within the limits of a single State.*

It is not considered by your Committee desirable that the whole authority, as to the location of bridges, shall be turned over to the War Department; but under the pending bill it is provided that when authority to construct a bridge has been granted by Congress the plans and specifications for such bridge, as well as the actual location, shall be submitted to the Secretary of

War and the Chief of Engineers and shall be approved by them before the work of construction can begin. The bill reserves to the Secretary of War and the Chief of Engineers the right to order changes to be made in the bridge at any time in the interest of navigation.

The bill also provides that the owners of the bridge shall be liable for any damage to private property caused by the construction, maintenance, or operation of the bridge; also that the bridge may be used by the Government, both for telegraph and telephone lines, without expense; also that the bridge shall be open to all telegraph lines and telephone lines on equal terms; also that the bridge shall be a post route and that no charge shall be made against the Government for the carriage of mail or transportation of military supplies or other governmental matter at a higher rate than is charged on the roads approaching the bridge; also that suitable lights and signals shall be maintained on the bridge; also that the draw on the bridge, if it shall be a draw bridge, shall be opened upon reasonable notice; together with a number of other provisions such as are now usually inserted in special bridge bills passed by Congress.

In order to establish uniformity in reference to the construction of bridges and also to economize the time of Congress and reduce the length of bills and statutes, your committee respectfully recommends the passage of the bill, which has been approved by the Secretary of War and the Chief of Engineers, with the amendments suggested by them. [Italics ours.]"

Amend by striking out of line 25 on page 3 the word "then" and inserting in lieu thereof the words "such tolls shall be reasonable and just and."

Amend by inserting in line 25, page 3, after the word "time," the words "and from time to time."

Amend by striking out of line 19, page 4, the words "as an obstruction to navigation."

Amend by striking out of line 7, page 7, the words "the chief of engineers or."

Amend by striking out of line 12, page 5, after the word "district," the word "in."

[Second Endorsement]

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ENGINEERS,
Washington, January 5, 1906.

Respectfully returned to the Secretary of War.

It is understood that the object of the accompanying bill, H. R. 6009, Fifty-ninth Congress, first session, "To regulate the construction of bridges over navigable waters," is simply to combine in one law the provisions under which all bridges hereafter authorized by Congress across navigable waters shall be constructed. [Italics ours.]

After careful consideration I see no objection to favorable consideration of the bill by Congress.

A. MACKENZIE,

Brig.-Gen., Chief of Engineers, U. S. Army.

[Third Endorsement]

WAR DEPARTMENT,
January 6, 1906.

Respectfully returned to the chairman, Committee on Interstate and Foreign Commerce, House of Representatives, inviting attention to the foregoing report of the Chief of Engineers, U. S. Army.

ROBERT SHAW OLIVER,
Assistant Secretary of War.

2. Debates (40 Cong. Rec., Pt. 2, p. 1717).

Mr. Garrett: Mr. Speaker, may I ask the gentleman a question?

The Speaker *pro tempore:* Does the gentleman yield?

Mr. Mann: I yield.

Mr. Garrett: To what extent does the power of the Secretary of War now go on streams wholly within the limits of the State? That is, what is the extent of the power of the respective legislatures of the States and the extent of the power of the Secretary of War in regard to the construction of bridges across streams?

Mr. Mann: *As I said before, the right, so far as the Government is concerned, is a mere license, a right to prevent the construction of bridges, and under the existing statute the Secretary of War is authorized, so far as the Government is concerned, to give consent to the erection of bridges over any stream wholly within the limits of a State. Of course,* THE POWER TO CONSTRUCT THE BRIDGES MUST BE DERIVED FROM THE STATE ITSELF, *but the Government does not interfere with the right to do this. In other words, the power of the Government is not exercised to regulate interstate commerce, but to prevent the interference with navigation and navigable streams, and the Government merely waives its right in behalf of persons who must obtain their authority elsewhere.* [Italics ours.]

Mr. Sheppard: Mr. Speaker, may I ask the gentleman a question?

Mr. Mann: I yield to the gentleman.

Mr. Sheppard: Under the gentleman's bill, what opportunity would one have to express his opposition to certain bridge bills? Would he have to go to the Secretary of War?

Mr. Mann: Under this bill, Mr. Speaker, there must still be a bill passed through Congress in each case. It has not been considered desirable by the committee reporting the bill to transfer the whole authority to the Secretary of War. I may say to the gentleman that up to within a few years ago there was no Federal control over the matter of building bridges over streams, and the result was that until Congress assumed control of that matter it became a common thing to erect bridges which did interfere with navigation, and all over

the country there are now bridges which do interfere with navigation, put there before Congress prohibited that. *Finally Congress passed a law providing that no bridges should be built across navigable streams until the consent of Congress should be obtained, except that in rivers wholly navigable within a State the Secretary of War might give that consent. This bill simply provides that when Congress shall hereafter grant authority to build a bridge it shall be upon the terms named in this bill, the terms being those usually insisted upon by the committee of the two Houses having jurisdiction, and by Congress itself.* [Italics ours.]

Mr. Sheppard: And special bills must be introduced hereafter?

Mr. Mann: Special bills will still have to be brought in, the theory of the committee being that the Member of Congress from the district is, after all, the best one to judge in ordinary cases as to whether the bridge should be permitted to be constructed at all at the place, but that uniform regulations ought to be provided in those cases, unless exceptional circumstances exist; and if exceptional circumstances do exist in any case, the Member of Congress from the district who introduces the bill can make provision for that in his bill and show the exceptional circumstances.

Mr. Sheppard: How will a saving of time be effected if bills must still be introduced as heretofore and receive consideration as heretofore?

Mr. Mann: As I say, we passed through the last Congress 100 different bridge bills. The ordinary bill covers from one to five pages of the bill page size, and covers a considerable space in the statutes. If this bill be enacted into law all that will be required in an ordinary case will be the introduction of a bill which will read like this:

Be it enacted, etc., That the John Doe Railroad Company, its successors and assigns, be and they are hereby, authorized to construct, maintain, and operate a bridge across the Richard Roe River, at

or near Black Acre, in the State of——, in accordance with the provisions of the act entitled 'An act to regulate the construction of bridges over navigable waters, approved ——, ——, 19—.'

3. New Jersey Laws of 1860, Chapter 64.

A further supplement to an act entitled, "An act to incorporate the Somerville and Easton Railroad Company," passed February twenty-sixth, eighteen hundred and forty-seven.

1. Be it enacted *by the Senate and General Assembly of the State of New Jersey,* That it shall and may be lawful for the Central Railroad Company of New Jersey to extend their railroad from some point in their track in the City of Elizabeth, to some point or points on New York bay, in the County of Hudson, at or south of Jersey City; and for that purpose, in its construction and completion, maintenance, use and enjoyment, all and every provision of the act entitled, "An act to incorporate the Somerville and Easton Railroad Company," and of the several supplements thereto, shall extend and be applicable to the railroad now authorized to be constructed, in every respect as if the same had been originally authorized under the said act to which this is a supplement.

2. *And be it enacted,* That the said railroad company shall construct a suitable bridge over any navigable water that they may cross, with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel, located at a point convenient for navigation; and for the safety of persons navigating the said river or water, the said company shall cause to be kept a red light at each outer side of said draw, and a white light on each inner side of said draw, which shall be lighted every evening before it grows dark, and kept lighted till daylight; and shall keep or cause to be kept at such bridge, a

careful person or persons to open such draw for the free passage of vessels with standing masts; and for each and every wilful neglect to light the said lamp or lamps for one night, or to open said draw, the company shall forfeit and pay the sum of fifty dollars, to be recovered, with costs, in any court having jurisdiction thereof, by any person who shall sue for the same, within six months from the time of such neglect.

3. *And be it enacted,* That it shall be the duty of said company, for the accommodation of commuters and the local travel, to continue their early morning and evening trains from and to Somerville and New York, at least as early in the morning as seven o'clock from Somerville, and as late in the evening from New York as four and a half o'clock.

4. *And be it enacted,* That nothing herein contained shall be construed to prejudice the claims of riparian shore owners, and that in constructing their said railroad in the County of Hudson, they shall not cross the Jersey City and Bergen Point plank road more than once, and shall not construct said road nearer than one thousand feet from a parallel line with the said plank road, except where it may cross the same.

5. *And be it enacted,* that this act shall take effect immediately.

Approved February 23, 1860.

4. Excerpt from the Act of Congress of March 3, 1899.

(Rivers and Harbors Appropriation Act,
30 Stat., 1151.)

* * * * * * * * *

SEC. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 10. That the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor

lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same.

* * * * * * * * *

Approved, March 3, 1899.

5. Act of Congress of March 23, 1906, known as the "Bridge Act of 1906."

(34 Stat., 84)

CHAP. 1130. An Act To regulate the construction of bridges over navigable waters.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion fo the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War.

SEC. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct,

maintain, and repair, without any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies.

SEC. 3. That all railroad companies desiring the use of any railroad bridge built in accordance with the provisions of this Act shall be entitled to equal rights and privileges relative to the passage of railway trains or cars over the same and over the approaches thereto upon payment of a reasonable compensation for such use; and in case of any disagreement between the parties in regard to the terms of such use or the sums to be paid all matters at issue shall be determined by the Secretary of War upon hearing the allegations and proofs submitted to him.

SEC. 4. That no bridge erected or maintained under the provisions of this Act shall at any time unreasonably obstruct the free navigation of the waters over which it is constructed, and if any bridge erected in accordance with the provisions of this Act shall, in the opinion of the Secretary of War, at any time unreasonably obstruct such navigation, either on account of insufficient height, width of span, or otherwise, or if there be difficulty in passing the draw opening or the draw-span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the Secretary of War, after giving the parties interested reasonable opportunity to be heard, to notify the persons owning or controlling such bridge to so alter the same as to render navigation through or under it reasonably free, easy, and unobstructed, stating in such notice the changes required to be made, and prescribing in each case a reasonable time in which to make such changes, and if at the end of the time so specified the changes so required have

not been made, the persons owning or controlling such bridge shall be deemed guilty of a violation of this Act; and all such alterations shall be made and all such obstructions shall be removed at the expense of the persons owning or operating said bridge. The persons owning or operating any such bridge shall maintain, at their own expense, such lights and other signals thereon as the Secretary of Commerce and Labor shall prescribe. If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft. If tolls shall be charged for the transit over any bridge constructed under the provisions of this Act, of engines, cars, street cars, wagons, carriages, vehicles, animals, foot passengers, or other passengers, such tolls shall be reasonable and just, and the Secretary of War may, at any time, and from time to time, prescribe the reasonable rates of toll for such transit over such bridge, and the rates so prescribed shall be the legal rates and shall be the rates demanded and received for such transit.

SEC. 5. That any person who shall fail or refuse to comply with the lawful order of the Secretary of War or the Chief of Engineers, made in accordance with the provisions of this Act, shall be deemed guilty of a violation of this Act, and any persons who shall be guilty of a violation of this Act shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished in any court of competent jurisdiction by a fine not exceeding five thousand dollars, and every month such persons shall remain in default shall be deemed a new offense and subject such persons to additional penalties therefor; and in addition to the penalties above described the Secretary of War and the Chief of Engineers may, upon refusal of the persons owning or controlling any

such bridge and accessory works to comply with any lawful order issued by the Secretary of War or Chief of Engineers in regard thereto, cause the removal of such bridge and accessory works at the expense of the persons owning or controlling such bridge, and suit for such expense may be brought in the name of the United States against such persons, and recovery had for such expense in any court of competent jurisdiction; and the removal of any structures erected or maintained in violation of the provisions of this Act or the order or direction of the Secretary of War or Chief of Engineers made in pursuance thereof may be enforced by injunction, mandamus, or other summary process, upon application to the circuit court in the district in which such structure may, in whole or in part, exist, and proper proceedings to this end may be instituted under the direction of the Attorney-General of the United States at the request of the Secretary of War; and in case of any litigation arising from any obstruction or alleged obstruction to navigation created by the construction of any bridge under this Act, the cause or question arising may be tried before the circuit court of the United States in any district which any portion of said obstruction or bridge touches.

SEC. 6. That whenever Congress shall hereafter by law authorize the construction of any bridge over or across any of the navigable waters of the United States, and no time for the commencement and completion of such bridge is named in said Act, the authority thereby granted shall cease and be null and void unless the actual construction of the bridge authorized in such Act be commenced within one year and completed within three years from the date of the passage of such Act.

SEC. 7. That the word "persons" as used in this Act shall be construed to import both the sin-

gular and the plural, as the case demands, and shall include municipalities, quasi municipal corporations, corporations, companies, and associations.

SEC. 8. That the right to alter, amend, or repeal this Act is hereby expressly reserved as to any and all bridges which may be built in accordance with the provisions of this Act, and the United States shall incur no liability for the alteration, amendment, or repeal thereof to the owner or owners or any other persons interested in any bridge which shall have been constructed in accordance with its provisions.

Approved, March 23, 1906.

6. New Jersey Laws of 1914, Chapter 123.

An Act to create the New Jersey Harbor Commission and to define its powers and duties.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey.*

1. The Governor, with the advice and consent of the Senate, shall appoint five persons, not more than three of whom shall be of the same political party, residents of this State for at least five years previous to appointment, who shall constitute the New Jersey Harbor Commission. * * *

3. It shall be the duty of the commission to investigate and report annually to the Legislature the condition of the water front or harbor facilities, and any other matter incident to the movement of commerce upon all navigable rivers and waters in this State, or bounding thereon, and to recommend to the Legislature, and to the various municipalities of this State interested therein, such measures as may, in the judgment of the commission, be necessary or advisable for the preservation of proper navigation or its improvement, or the improvement of the movement of commerce upon such waters, and, concurrently with the Riparian Commission of this State, or any board or body which may succeed to the powers of said commission, the commission created by this act shall have power, by appropriate action in any court, to prevent encroachment or trespass upon the water front of any of the navigable waters of this State, or bounding thereon, or upon the riparian lands of this State, and to compel the removal of any such encroachment or trespass, and to restrain, prevent and remove any construction, erection or accretion injurious to the flow of any such waters which may be detrimental to the proper navigation thereof, and the maintenance and improvement of commerce thereon.

4. All plans for the development of any water front upon any navigable water or stream of this State, or bounding thereon, which is contemplated

by any person, corporation or municipality, in the nature of individual improvement or development, or as a part of a general plan which involves the construction, change, alteration or modification of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water front development, to be undertaken subsequent to the passage of this act shall first be submitted to the said commission, and no such development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof, shall be commenced or executed without the approval of this commission first had and received, or as hereinafter provided. Upon the presentation of plans for any such improvement, the commission shall forthwith consider the same, and shall, if necessary or desirable, hold public meetings for consideration thereof, under such rules and regulations as the commission may establish. Before any plans are approved or disapproved, the commission shall have power, except as hereinafter provided, to direct such changes or alterations in the plans submitted as it may deem necessary or advisable, as a condition precedent to approval. * * * Any development or improvement enumerated within the provisions of this section, or included within a proper interpretation thereof which shall have been commenced or executed without first obtaining approval as provided in this section, shall be deemed to be a purprestur and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; *provided, however*, this section shall not apply to, or affect, any development for docks, shipping and transportation facilities heretofore inaugurated by a municipality, which is under construction in whole or in part, if such municipality has, prior to the passage of this act, filed with the Secretary of State a map showing the lands proposed to be taken for such municipal development.

* * * * * * *

Approved April 8, 1914.

7. New Jersey Laws of 1915, Chapter 242.

An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all the powers and duties now devolved, by law, upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. A department of commerce and navigation is hereby established, and the same shall be governed by a board to be known as the 'Board of Commerce and Navigation.'

* * * * * * * * *

5. The Board of Commerce and Navigation shall succeed to and exercise all the powers and perform all the duties now exercised and performed by or conferred and charged upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, appointed under chapter ninety-one of the laws of one thousand nine hundred and six, and the acts amendatory thereof and supplementary thereto, and the New Jersey Harbor Commission (with which last-named commission the New Jersey Ship Canal Commission was consolidated, by the provisions of chapter two hundred fifty-one of the laws of one thousand nine hundred and fourteen).

* * * * * * * * *

13. Whenever, in any act, the words, the 'Board of Riparian Commissioners,' the 'Department of Inland Waterways,' the 'Inspectors of Power Vessels,' the 'New Jersey Harbor Commission,' and the 'New Jersey Ship Canal Commission,' are used, the same shall be taken to be and to mean the Board of Commerce and Navigation.

* * * * * * * * *

Approved April 8, 1915.

8. Special Act of Congress of August 8, 1919.

(41 Stat., 277.)

CHAP. 42.—An Act To authorize the Central Railroad Company of New Jersey to construct a bridge across the navigable waters of the Newark Bay, in the State of New Jersey.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and is hereby, granted to the Central Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, its successors and assigns, to construct, maintain, and operate a bridge, and approaches thereto, across the Newark Bay, in the State of New Jersey, at a point suitable to the interests of navigation between the city of Elizabeth, in the county of Union, and the city of Bayonne, in the county of Hudson, in said State, in accordance with the provisions of the Act entitled "An Act to regulate the construction of bridges over navigable waters," approved March 23, 1906.

Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, August 8, 1919.

9. Special Act of Congress of February 15, 1921.

(41 Stat., 1099.)

CHAP. 47.—An Act to extend the time for the construction of a bridge across the navigable waters of the Newark Bay, in the State of New Jersey.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the times for commencing and completing the construction of a bridge authorized by Act of Congress approved August 8, 1919, to be built by the Central Railroad Company of New Jersey, across the Newark Bay between the city of Elizabeth and the city of Bayonne, New Jersey, are hereby extended two and five years respectively, from the date of approval of this Act.

Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved.

Approved, February 15, 1921.

Outline of Reply Brief.

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I.	Appellants have never contended that the doctrine of concurrent authorization of bridges applied to interstate bridges	1
II.	Newark Bay is not an interstate body of water	2
III.	It is inexact to say that commerce and not navigation is the object of constitutional care	5
IV.	The State consent to the old bridge cannot be extended by implication to embrace the new	6
V.	Appellants' cases have not been distinguished by appellee, and require a reversal of the decree below	10

IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY,
Appellants,

against

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

October Term, 1924
No. 351

APPELLANTS' REPLY BRIEF.

I.

The brief of the appellee Central Railroad Company of New Jersey overstates the appellants' contentions, and is quite inaccurate in its statement (p. 8) that appellants

> "claim that Congress has no authority to authorize the construction of any bridge over *any navigable water, state or interstate*, without the consent or concurrence of the States in or between which the waters lie."

What the appellants do contend is the following (being the heading to Point II of our main brief, p. 27):

> "The concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters *wholly within one State* may be lawfully erected."

It would seem that this attempt to stretch our contentions to untenable breadth is but a step in the process of imparting to cases on interstate bridges a relevance which they would not otherwise possess. The appellee railroad's principal cases being cases of interstate bridges, it is natural that it should contend that our brief puts interstate and intrastate bridges on a parity. The fact remains that it does not.

II.

The attempt of the appellee railroad (brief, pp. 8-10) to establish the interstate character of Newark Bay and to overcome the effect (as an admission of the truth of the opposite contention) of its motion to dismiss, is futile.

The District Court in its opinion, states briefly and accurately that the "waters of Newark Bay at the bridge site are navigable and lie wholly in the State of New Jersey" (Rec., p. 88).*

Newark Bay does not extend to Staten Island or to the boundary line between New Jersey and New York, fixed by the agreement of these States in the middle of the waters between Staten Island and New Jersey. These waters always have been known as "Staten Island Sound", with the "Kill Van Kull" at the eastern end of the Sound and the "Arthur Kill" at the southern end. Newark Bay extends to the edge of these waters only, whereas the boundary between New Jersey and New York lies in the middle of them.

---

*The only observations on this subject in the opinion of the Circuit Court of Appeals are these (Rec., p. 108): "The complainants contend that these Amendments require that the concurrent consent of both State and Federal Government be obtained before a bridge over navigable waters wholly within one State may be lawfully constructed. Disregarding at present the contention of the respondent that the waters in question are not wholly within the State of New Jersey, is the proposition sound?" The Court made no further allusion to respondent's last mentioned contention.

The maps annexed to the Bill of Complaint do not attempt to show the limits of Newark Bay, but those limits may be seen on the official maps.

Furthermore, the boundary agreement between New York and New Jersey, referred to by appellee, shows clearly that no part of the waters between Staten Island and New Jersey is included in the limits of Newark Bay. Article Fourth of the agreement (4 U. S. Stat., 708, 710) provides:

> "The state of New York shall have exclusive jurisdiction of and *over the waters of the Kill Van Kull between Staten Island and New Jersey to the westernmost end of Shooter's Island* in respect to such quarantine laws, and laws relating to passengers, as now exist or may hereafter be passed under the authority of that state, and for executing the same; and the said state shall also have exclusive jurisdiction, for the like purposes of and over *the waters of the sound from the westernmost end of Shooter's Island to Woodbridge creek*, as to all vessels bound to any port in the said state of New York." (Italics ours.)

The agreement, while fixing the boundary line in the middle of the various waters between the States, gives to New York exclusive jurisdiction of the whole of these waters as far as the low water-mark on the New Jersey side, from the northern end of Manhattan Island to the point where Woodbridge Creek flows into Staten Island Sound. In describing these waters over which New York has jurisdiction, it refers to the waters between Staten Island and New Jersey "to the westernmost end of Shooter's Island" as "the Kill Van Kull" and to the waters "from the westernmost end of Shooter's Island to Woodbridge Creek" as "the sound". Together, the two bodies of water cover the entire distance and there is no room for Newark Bay to come between them. There is no mention whatever of Newark Bay, as there most

certainly would be if, as the appellee railroad contends, Newark Bay extended to Staten Island.

In *People* v. *Central R. R. Co. of New Jersey*, 42 N. Y., 283 (1870), cited at page 9 of the brief of the appellee railroad, the opinion states (p. 291):

> "From a message of the governor of this State to the legislature, dated March 11, 1831 (*vide* Senate Documents of 1831, No. 55), and accompanying papers, it appeared that the State of New Jersey, in June, 1829, had commenced a suit in the Supreme Court of the United States against this State, claiming that 'the said State of New Jersey was justly entitled to the exclusive jurisdiction and property of and over the waters of Hudson river, from the forty-first degree of north latitude, to the Bay of New York to the *filum aquae* or midway of the said river, and to the midway or channel of said Bay of New York, *and the whole of Staten Island sound*, together with the land covered by the water of the said river, bay and sound in the like extent.'" (Italics ours.)

It is obvious that the State of New Jersey, in making this broad claim, considered "Staten Island sound" as being the entire body of water from the northern end of what is known as the Kill Van Kull to the southern end of what is known as Arthur Kill. Newark Bay would surely have been mentioned in the enumeration, if anyone had had any idea that it extended to the Staten Island shore. The State of New Jersey in that event would have also claimed jurisdiction to "the whole of Newark Bay". It would not have claimed jurisdiction over "the whole of Staten Island sound" and failed to claim jurisdiction over that part of Newark Bay which extended to the Staten Island shore.

It follows therefore that the appellee railroad's view of the matter is not based on notorious facts within the judicial notice of this Court. On the contrary, it is opposed to specific adjudications heretofore made. Even if the point were disputable, this Court should, under the doctrine of the *Chicago Junction Case*, 264 U. S., 258, 262-263 (1924), accord the motion to dismiss the effect of an

admission of the truth of the contention made by the appellant City of Newark in its complaint.

We question the propriety of the quotation in the appellee railroad's brief (pp. 54-55) from the Answer of its co-defendant, the Port of New York Authority, in attempted disproof of an allegation in the Bill of Complaint. Since a motion to dismiss a bill admits the truth of its allegations of fact, it is manifestly improper for a defendant moving to dismiss to attempt to controvert the same allegations by borrowing denials set up in the Answer of a co-defendant. "A demurrer is addressed to matters apparent on the face of the pleadings. In aid of it the Court cannot look to facts appearing in other parts of the record." *Brooks* v. *Metropolitan Life Ins. Co.*, 70 N. J. Law, 36, 39 (1903).

III.

The statement from the opinion of the Circuit Court for the District of New Jersey in *Stockton* v. *Baltimore & New York R. Co.*, 32 Fed., 9 (1887), appellee railroad's brief, page 29, that

> "It is commerce and not navigation, which is the great object of constitutional care"

is not in harmony with later decisions of this Court. See the decisions of this Court cited in our main brief, pp. 38, 44 and 70-74. Our respect for Mr. Justice BRADLEY's memory is great; but it is hardly proper to accord decisions by him sitting alone at Circuit a force equal to that of this Court sitting *en banc*. The quoted words are equally out of harmony with the theory of the Bridge Act of 1906, which, as pointed out at page 44 of our main brief, is essentially a navigation measure.

The supremacy of navigation at points of conflict with land-borne commerce is a necessary consequence of the fact that the natural highways of rivers are immovable and cannot be shifted, whereas there is always room for latitude in the location of tracks and bridges.

IV.

To the argument (appellee railroad's brief, pp. 46, *et seq.*), that the New Jersey Act of 1860 (printed as an appendix to our main brief, pp. 95-96) was a plenary grant of authority ample enough to embrace the proposed, as well as the existing bridge, it seems a sufficient answer that the appellee railroad acted for many years on the assumption not only that a new manifestation of State assent was necessary but that the Board of Commerce and Navigation was the proper agency to which to apply for such assent (Rec., pp. 15-16). Furthermore, the appellee railroad by applying for a special Act of Congress under the Bridge Act of 1906, has admitted that the replacement of the existing bridge by a new one is a separate and distinct enterprise and not a continuation of an old one begun in 1860. And its conduct was consistent with the prevailing congressional view. Thus on February 1, 1924, Congress passed an act (43 Stat., 4) authorizing certain El Paso, Texas, street railroads to construct a bridge over the Rio Grande "to replace the wooden bridge now in use at or near the aforesaid location, operated by said corporations under the authority of an Act of Congress passed and approved July 28, 1882" (22 Stat., 179).

If authority be required for the support of the foregoing we have it in the cases of *Morris & Essex R. Co.* v. *Central R. R. Co. of New Jersey*, 31 N. J. Law, 205 (1865), and *McCran* v. *Erie Railroad Co.*, 95 N. J. Eq., —, 124 Atl., 50 (Ct. Errors and Appeals, 1924).

In the former case, the Central Railroad Co. of New Jersey (the appellee in the case at bar), intending to cross the tracks of the Morris & Essex Railroad Co. with a new branch, had commissioners designated to assess damages. An award having been made, the Morris & Essex Railroad Co. sued out a writ of certiorari and

argued that the Central Railroad lacked corporate authority to build the proposed branch. The charter authorized the construction of certain lines of railroad; these had been built under the charter, but the Central Railroad claimed the right to alter the original plans and construct a new line to meet certain "exigencies produced by the developments of its business" (p. 208). But the Court denied the existence of the power and said (pp. 208-209):

> "The language of the act, in all its parts, is plain and intelligible. It authorizes the making of a road or roads and one branch road, and the acquisition and construction of certain convenient adjuncts. This is the entire scope. The company may do, at their option, one or more things; they do the act or acts and thus signify their election; and that is final. Any other conclusion would leave the scheme authorized by the legislature forever unsettled and undetermined. Every private right in the vicinity of the road would be subordinated to it. There is not a word in the act which seems to intimate the transmission of the right to alter the road, when once laid, or to add to or extend it; and it is scarcely necessary to say that such a prerogative cannot be the creature of intendment. The claim of a power so much in derogation of common right and public interests, could only be sustained by the most manifest intention on the part of the legislature to confer it. But there is nothing in the language of this act which, fairly dealt with, tends in that direction."

The Court went on to say (p. 209):

> " * * * it has been held, repeatedly, that the powers given to a corporation to take lands, when once exercised are exhausted. Thus the right of a railroad company, after their road was actually located, to make a relocation or to abandon the route adopted by them for a more eligible one, was entirely repudiated in the case of *Moorhead* v. *The*

Little Miami R. Co., 17 Ohio, 340 [1848]. And the same principle was applied in the case of *Blakemore* v. *The Glamorganshire Canal*, 1 Mylne & Keen, 154 [1832]."

In the *McCran* case, the Attorney General of the State of New Jersey sought to enjoin the Erie Railroad from appropriating without payment lands under water belonging to the State. The Court of Chancery (LEWIS, V.-C.) advised a decree for defendant on the ground that inasmuch as the original bridge and its connecting tracks were to be abandoned, the land under water occupied by it would revert to the State and would be a fair equivalent of the land to be taken for the proposed bridge (93 N. J. Eq., 286, 290). However, to protect all parties and to permit the bridge to be built pending an appeal, the Railroad was ordered to pay an appropriate sum into Court. This sum the Court of Errors and Appeals, reversing the Vice-Chancellor, ordered paid to the Board of Commerce and Navigation of the State of New Jersey,* or other proper state authority. The Court said (124 Atl. at p. 51):

*Section 16 of the Railroad Law (3 N. J. Comp. Stat. 4228) reads as follows:

> "16. *Bridges; viaducts; tunnels; taking land under water belonging to state.*—Any railroad company may build and maintain over such streams as the road may cross, such piers and bridges as they may deem expedient, and may build viaducts over or tunnels under any navigable or other river, stream or bay of water which such railroad may cross; putting in such viaduct a pivot-draw with two openings, each of no less width than the widest opening of any viaduct or bridge now built over any such river, stream or bay of water, at right angles to the main channel, located at a point convenient for navigation; provided, that such company shall not take any land under water belonging to this state until the consent of the riparian commissioners shall first be had and obtained (unless the said land is at least twenty-five feet under the bed of the water), who are hereby authorized to convey the same on receiving such compensation as they may fix. [P. L. 1903, p. 655.]"

By Sec. 5 of N. J. Laws 1915, c. 242 (printed in the Appendix to our main brief, p. 106) it was provided that the Board of Commerce and Navigation should "succeed to and exercise all the powers and perform all the duties now exercised and performed by or conferred and charged upon the Board of Riparian Commissioners * * *."

> "It is argued that the power given by the charter to build bridges (in the plural) over the Passaic and Hackensack rivers is general in its terms and in effect enables the company to build an indefinite number of bridges over each river as desired from time to time. Applying the principle that legislative grants are construed strictly, we hardly think this proposition requires extended comment."*

Even if we ignore the statutes set forth in the footnote, *ante*, page 8, and admit for the sake of argument that the Board of Commerce and Navigation of the State of New Jersey was without jurisdiction to entertain the three successive and unsuccessful applications addressed to it by the appellee railroad (Rec., pp. 15-16), the consequence therefrom is not that the State of New Jersey has waived its right to require that its consent to the new bridge be secured. The true consequence would be that the right to give or withhold consent remained in the Legislature and was never delegated to any board or commission.

See in this connection *People* v. *Delaware & Hudson Co.*, 213 N. Y., 194, 202 (1914), where the Court said:

> "As the general control of navigable waters is vested in the state, consent to bridge Island Creek should come from the legislature * * * unless the state through the legislature has delegated its power to give such authority. It has not, so far as has come to our notice, delegated such authority to the courts."

There is nothing in the organic law of New Jersey to prevent the principle of the foregoing case from being applicable there as well as in New York.

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*See to the same effect the cases in the footnote on page 11 of our main brief.

V.

The brief of the appellee railroad ignores all the decisions on our main brief (pp. 48, *et seq.*) handed down after March 23, 1906, with the exception of the two cases which came up from New York, viz., the *International Bridge* case and the *Hudson River Connecting* case.

It is submitted these cases, which are ten in number, cannot be ignored or distinguished and that they must control the decision in the case at bar. Certain it is that they are not outweighed by the two earlier Circuit Court cases (the *Decker* and *Stockton* cases,* which related to *interstate* bridges) on which the appellee railroad so confidently relies.

Our theory of the statute is expounded at page 43 of our main brief, and need not be repeated here. The appellee railroad has made no attempt to refute it in any particular. We submit that the decisions of this Court cited in our original brief amply sustain the contentions based upon them.

*Reported, respectively, in 30 Fed., 723, and 32 Fed., 9.

Conclusion.

The final decree appealed from should be reversed with costs, and the cause remanded with directions to reinstate the complaint and proceed to a determination of the controversy upon the merits.

Dated, Newark, N. J., November 14, 1924.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 351.

THE CITY OF NEWARK, THE CITY OF JERSEY CITY, and THE STATE OF NEW JERSEY,
Appellants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

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Supreme Court of the United States

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No. 351.

THE CITY OF NEWARK, THE CITY OF JERSEY CITY, and THE STATE OF NEW JERSEY,
Appellants,

vs.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY,
Appellees.

On Bill of Complaint.

ON APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANT-APPELLEE, THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

Statement of the Case.

The case is before the Court upon an appeal from a decree of the United States Circuit Court of Appeals for the Third Circuit affirming a decree of the District Court for the District of New

Jersey denying a preliminary injunction and dismissing the bill of complaint as against the defendant The Central Railroad Company of New Jersey for want of equity.

The City of Newark, a New Jersey municipal corporation, was the original complainant, and the State of New Jersey, and the City of Jersey City, another New Jersey municipal corporation, were admitted as complainant-intervenors. These three.complainants are the appellants. The Railroad Company and The Port of New York Authority are the only defendants.

The injunction sought was one to restrain the Railroad Company from building a draw-bridge across Newark Bay from Elizabeth to Bayonne to replace a draw-bridge constructed shortly after 1860 and ever since maintained by the Railroad Company under an Act of the Legislature of the State of New Jersey passed in that year.

Abstract of the Bill of Complaint and Intervening Petitions.

The bill of complaint alleges that the City of Newark is the owner of certain real estate and riparian rights appurtenant thereto located on the westerly shore of Newark Bay, a navigable tidal body of water lying wholly within the State of New Jersey; that the City is engaged in improving its said lands for transportation, shipping and other industrial purposes, and in establishing thereon a Port Terminal, in the carrying out of which work it has thus far expended $6,500,000; that this project contemplates that ocean-going steamers and sailing craft, engaged

in intrastate, interstate and foreign commerce shall have free access to such Terminal; that for a number of years the Railroad Company has maintained a bridge with draws across Newark Bay at a point between complainant's property and the junction of Newark Bay with Kill von Kull and Staten Island Sound; that such bridge was constructed and has been maintained pursuant to an Act of the Legislature of the State of New Jersey enacted in 1860, and is a serious obstruction to the navigation of Newark Bay by vessels seeking such Terminal (R., pp. 10, 11).

The bill further alleges that on August 8, 1919, Congress passed an Act granting the Railroad Company authority to construct, maintain and operate a new draw-bridge in place of the present bridge, such grant being made in accordance with the provisions of an Act of Congress entitled "An Act to regulate the construction of bridges over navigable waters" approved March 23, 1906 (34 U. S. Statutes, p. 84); that said last named Act required the construction of the bridge authorized by the Act of August 8, 1919, to be commenced within one year and completed within three years from its date; that the construction of the bridge was not commenced within the time so specified, and that therefore the authority granted to the Railroad Company ceased, expired and became null and void on August 8, 1920; that by a further Act approved February 15, 1921, Congress undertook to extend the time for the commencement and completion of the construction of such bridge for two and five years respectively from the date of the approval of such further Act of 1921, and that inasmuch as the original authority granted by Congress had then expired such Act of Febru-

ary 15, 1921, was inoperative and did not confer upon the Railroad Company any right to construct or maintain a bridge (R., pp. 12-13).

The bill further alleges that by the laws of the State of New Jersey all plans for the development of any water front upon any navigable water or stream of the State or bounding thereon, which involve the construction, change, alteration or modification of a bridge, must be approved by the State Board of Commerce and Navigation, and that any development or improvement made without such approval shall be deemed to be a purpresture and a public nuisance and shall be abated in the name of the State of New Jersey in such action as shall be appropriate for that purpose; that the Railroad Company has not secured the approval of its plan for such new bridge or a permit therefor from such State Board; that the States of New York and New Jersey have authorized the creation of a district to be known as the Port of New York District, which embraces among other things all of the waters of Newark Bay, and has also created a body known as "Port of New York Authority"; that such Port Authority has developed a comprehensive plan for the improvement of such Port District in which the existing bridge of the Railroad Company is not made a part, and that the consent of Congress has by public resolution been given to the execution of such plan "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution" (R., pp. 14-21); that neither the maintenance of

the present bridge nor the construction of the proposed new bridge is necessary to the proper maintenance and operation of the railroad of such defendant as it has branch lines extending from Elizabethport around the northerly and westerly shores of Newark Bay to Communipaw (part of Jersey City), which are adequate for its needs; that the City of Newark is informed and believes that the construction of the new bridge not only would be an unlawful purpresture but would seriously interfere with the development of its said Terminal; that the Secretary of War and the Chief of Engineers have approved the plans of the Railroad Company for such new bridge, but that such action was arbitrary, and is wholly void and without authority in law because of the matters and things so as aforesaid alleged, and because such action, and the Acts of Congress upon which it was based, were and are in violation of the rights guaranteed to the complainant by the Fifth Amendment to the Constitution of the United States, and constitute an attempted usurpation of the powers reserved in the Constitution to the States respectively, or to the people, and are therefore in violation of the Tenth Amendment to the Constitution (R., pp. 21-23).

The intervening petition of Jersey City alleges that it is the owner of lands on the Newark Bay and the Hackensack River located above the bridge (R., pp. 82-84). The intervening petition of the State of New Jersey merely alleges that the Railroad Company has not obtained the approval of the State Board of Commerce and Navigation to its plans for the construction of the proposed bridge and that without such approval

the bridge would by law constitute a purpresture and a public nuisance (R., pp. 74-78). The intervening complainants each accepted the allegations of the bill of the City of Newark.

The location of the present and proposed bridges as well as that of the Port Newark Terminal and the site of the proposed Jersey City Bay Terminal are shown on the map which faces page 48 of the Record.

Proceedings in the District Court and the Circuit Court of Appeals.

The Railroad Company moved in the District Court for the dismissal of the bill as against it for want of equity (R., p. 53).

After hearing counsel for all the parties and considering the case, the District Court rendered an opinion which will be found on pp. 86-99 of the Record, and in conformity therewith a decree was entered denying the complainants' motion for a preliminary injunction and dismissing the bill as against the Railroad Company for want of equity (R., pp. 99-100).

From this decree the complainants appealed to the Circuit Court of Appeals for the Third Circuit, which Court, on February 29, 1924, rendered its opinion affirming the decree in all its parts (R., p. 106).

Assignments of Error.

Appellants' assignments of error will be found on p. 112 of the Record.

The principal errors assigned and now relied on are two in number:

1. (No. 4)—That "The court erred in holding that the Congress of the United States had power under the Constitution to authorize the construction of the bridge described in the bill of complaint without the approval thereof by the State of New Jersey or by the State Board of Commerce and Navigation of the State of New Jersey, and/or by the Port of New York Authority."

2. (No. 5)—That "The court erred in so construing the Act of Congress, approved March 23, 1906, and known as the Bridge Act of 1906, as to make the authorization of said Act sufficient for the construction of a bridge over navigable waters wholly within one state, and to render the authorization thereof by such state unnecessary."

As we understand these assignments, No. 4 challenges the power of Congress to make the grant contained in the Acts of August 8, 1919, and February 15, 1921, assuming that such Acts constitute a grant and not a mere consent. No. 5 questions the construction assumed to have been put upon the Bridge Act of 1906 by the Circuit Court of Appeals as authorizing the construction of a bridge over navigable waters wholly within a State without previous or concurrent authorization by such State.

ARGUMENT.

I.

Congress had the power to authorize the construction of the bridge in question without the approval thereof by the State of New Jersey or any of its agencies.

We had supposed that the general power of Congress by independent action to authorize the construction of bridges over navigable waters, in furtherance of interstate commerce, was too well established to be open to question. Indeed, it was conceded by the appellants in the Court below. All that they claimed in that Court was that this power is limited to the authorization of bridges over interstate waters and does not extend to their authorization over navigable waters lying wholly within a State. As to bridges of the latter class they insisted that the source of power for their construction resides in the States and that Congress can go no further than to veto its exercise to the extent necessary to protect navigation.

Now, however, they go the whole length and claim that Congress has no authority to authorize the construction of any bridge over any navigable water, state or interstate, without the consent or the concurrence of the States in or between which the waters lie.

This change of front is probably due to the fact that it was demonstrated in the Court below that

Newark Bay does not lie wholly within the State of New Jersey but is bounded on one side by Staten Island in the State of New York. The bill of complaint alleges, it is true, that Newark Bay lies wholly within the State of New Jersey, but this is a mere conclusion of the pleader with respect to facts that are of common knowledge or established by public records of which the Court will take judicial notice.

Corpus Juris, Vol. 23, pp. 81-83;
Middlesex Transportation Co. v. *Pennsylvania R. R. Co.*, 82 N. J. Eq. 550.

The map and photograph annexed to the bill of complaint (R., pp. 48, 51) show that Newark Bay is bounded on the east by Staten Island, and the agreement between the States of New Jersey and New York and the approval thereof by Congress fix the boundary line between the States, at the point in question, in the middle of the waters between Staten Island and New Jersey (Laws of New Jersey 1834, p. 118; Laws of New York 1834, p. 8; 4 U. S. Stat., p. 708).

This agreement is set forth and recognized as fixing the boundary between the two States in *Central Railroad of New Jersey* v. *Mayor and Aldermen of Jersey City*, 70 N. J. L. 81; 72 N. J. L. 311; 209 U. S. 473. It is also recognized by the Court of Appeals of the Third Circuit as having such effect in *Leary* v. *Mayor and Aldermen of Jersey City*, 208 Fed. 854, and by the New York Court of Appeals in *People* v. *Central Railroad of New Jersey*, 42 N. Y. 283.

Appellants contended in the Court below that Newark Bay is bounded on the east in part by the Kill Van Kull and in part by Staten Island Sound. But these are merely local names given to indistinguishable and inseparable parts of the waters of Newark Bay in so far as they cross that Bay. The Kill Van Kull properly extends from Newark Bay to New York Bay, and Staten Island Sound from Newark Bay to Amboy Bay. It would, we submit, be as reasonable and intelligible to speak of one body of water as running through another as to speak of the Kill Van Kull or the Staten Island Sound as running through or across the foot of Newark Bay.

In support of their present claim appellants assert that as the title to all lands under navigable waters is in the States, and as, under our system of government, the States have sovereign power and jurisdiction over all such land and water, the right of Congress to impose obstructions over the same cannot be accorded without depriving the States of both their property and their sovereignty.

The power of Congress to regulate interstate commerce is conferred by the Constitution in broad and comprehensive terms. It extends not only to commercial transactions but to all the appliances and facilities of commerce both by land and water. With respect to all these it has been often said that the power of Congress is supreme and that no State can set up its sovereignty in opposition thereto.

But what becomes of this supremacy of Congress if any State can arrest its exercise at the border of every navigable river or waterway lying

either within or along its boundaries? In the present case the bill of complaint alleges that the City of Newark is establishing a port terminal on Newark Bay above the proposed bridge and that this project involves the construction of warehouses, piers, bulkheads, slips, basins, ferries, docks and other facilities of commerce, known collectively as the Port Newark Terminal. It alleges that in carrying out said project the City of Newark has expended up to the time of the filing of the bill the sum of about $6,500,000 and that the project contemplates that ocean going steamers and sailing craft engaged not only in intrastate but also in interstate and foreign commerce shall have free access to said terminal (R., p. 10).

This is stated as the moral, if not the legal, justification for the opposition of the City of Newark and the State of New Jersey to the reconstruction of the Central Railroad bridge which has now become unsafe and must soon be abandoned whether a new bridge is constructed or not. And the opposition is not to the particular bridge proposed but to any bridge (R., pp. 11, 21).

It is obvious that if the City of Newark, with or without the aid of the State of New Jersey, can at will stop transportation over the Central Railroad at Newark Bay, either because the waters of the Bay lie wholly within the State of New Jersey or because the State has plenary power over all waters lying within its territorial jurisdiction, it can also stop the traffic of the Pennsylvania Railroad, the Baltimore & Ohio Railroad, the Lehigh Valley Railroad and the Lackawanna Railroad at the Bay, or at the Passaic and Hackensack Rivers, and can thus cut off these railroads from

the Port of New York and compel them to use the Port Newark Terminal. And what Newark can do, Albany, St. Louis and other cities can also do. The result would be that interstate commerce would be at the mercy of every State having a navigable river or waterway lying across the pathway of such commerce.

Congress has never by any act or action acknowledged any such limitation upon its power to regulate interstate commerce, and the courts from the earliest times have defined this power in language so broad and comprehensive as necessarily to exclude the suggested limitation or any other limitation not expressed in the Constitution.

Thus, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 196, Chief Justice Marshall, referring to the power of Congress to regulate interstate commerce, said:

> "This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

In *Smith* v. *Alabama*, 124 U. S. 465, 473, Mr. Justice Matthews said:

> "The grant of power to Congress in the Constitution to regulate commerce with foreign nations and among the several States, it is conceded, is paramount over all legislative powers which, in consequence of not having been granted to Congress, are reserved to the States. It follows that any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority."

In *California* v. *Pacific Railroad Co.*, 127 U. S. 1, 39, Mr. Justice Bradley said:

> "The power to construct, or to authorize individuals or corporations to construct, national highways and bridges from State to State, is essential to the complete control and regulation of interstate commerce. Without authority in Congress to establish and maintain such highways and bridges, it would be without authority to regulate one of the most important adjuncts of commerce. This power in former times was exerted to a very limited extent, the Cumberland or National road being the most notable instance. Its exertion was but little called for, as commerce was then mostly conducted by water, and many of our statesmen entertained doubts as to the existence of the power to establish ways of communication by land. But since, in consequence of the expansion of the country, the multiplication of its products, and the invention of railroads and locomotion by steam, land transportation has so vastly increased, a sounder consideration of the subject has prevailed and led to the conclusion that Congress has plenary power over the whole subject."

In *Houston & Texas Ry.* v. *United States*, 234 U. S. 342, 350, Mr. Justice Hughes said:

> "It is unnecessary to repeat what has frequently been said by this court with respect to the complete and paramount character of the power confided to Congress to regulate commerce among the several States. It is of the essence of this power that, where it exists, it dominates. Interstate trade was not left to be destroyed or impeded by the rivalries of local governments. The purpose was

> to make impossible the recurrence of the evils which had overwhelmed the Confederation and to provide the necessary basis of national unity by insuring 'uniformity of regulation against conflicting and discriminating state legislation.' By virtue of the comprehensive terms of the grant, the authority of Congress is at all times adequate to meet the varying exigencies that arise and to protect the national interest by securing the freedom of interstate commercial intercourse from local control."

An instructive case and one that directly answers most of the objections raised by the appellants is *Stockton, Attorney General of New Jersey*, v. *Baltimore & N. Y. R. R. Co.*, 32 Fed. 9.

This suit was commenced by an information filed by the Attorney General of the State of New Jersey in its Court of Chancery for an injunction to restrain the erection of the railroad bridge now commonly known as the Baltimore & Ohio Bridge across the Arthur Kill or Staten Island Sound between New Jersey and Staten Island. The suit was removed to the Federal Court and was deemed of sufficient importance to warrant the calling in of Mr. Justice Bradley to preside at the hearing. It appeared by the information that an application had been made by the Railroad Company to Congress for an act authorizing the construction of such bridge. While the measure was pending in Congress the New Jersey legislature passed an act forbidding the erection of the proposed bridge without express permission given by the Legislature by statute in that behalf. Such action was preceded by the adoption of concurrent resolutions of the Senate and House of As-

sembly of New Jersey protesting against any action on the part of Congress intended to authorize the erection of such a bridge. Almost immediately after the passage of the State law, Congress passed an act similar in effect to the one which appellants challenge in the present case, and thereupon the State filed its Information. The learned Justice, in his opinion directing the dismissal of the Information, said (p. 16):

> "The power to regulate commerce among the several states is given by the constitution in the most general and absolute terms. The 'power to regulate' as applied to a government, has a most extensive application. With regard to commerce, it has been expressly held that it is not confined to commercial transactions, but extends to seamen, ships, navigation, and the appliances and facilities of commerce. And it must extend to these, or it cannot embrace the whole subject. Under this power, the navigation of rivers and harbors has been opened and improved, and we have no doubt that canals and waterways may be opened to connect navigable bays, harbors and rivers with each other, or with the interior of the country. *Nor have we any doubt that, under the same power, the means of commercial communication by land as well as by water may be opened up by congress between different states, whenever it shall see fit to do so, either on failure of the states to provide such communication, or whenever, in the opinion of congress, increased facilities of communication ought to exist.*
>
> * * *
>
> *"Still, it is contended that, although congress may have power to construct roads and other means of communication between the states, yet this can only be done with the con-*

currence and consent of the states in which the structures are made. If this is so, then the power of regulation in congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of congress is supreme over the whole subject, unimpeded and unembarrassed by state lines or state laws; that, in this matter, the country is one, and the work to be accomplished is national; and that state interests, state jealousies, and state prejudices do not require to be consulted. In matters of foreign and interstate commerce there are no states." (Italics ours.)

Replying to the argument made in that case, as in this, based on the ownership of the State in the lands under water over which the bridge was to be constructed, Mr. Justice Bradley said (p. 17):

> "It is denied that the land of the state can be taken at all without voluntary cession, or consent of the state legislature. If this is so, we are brought back to the dilemma of requiring the consent of the state in almost every case of an interstate line of communication by railroad, for hardly a case can arise in which some property belonging to a state will not be crossed. It will always be so at the passage of a navigable stream. This shows that the position cannot be sound, for it brings us to a *reductio ad absurdum*. It interposes an effectual barrier to the execution of a constitutional power vested in congress. It overlooks the fundamental principle that the constitution, and all laws made in pursuance thereof, are the supreme law of the land; for, if the consent of a state is necessary, such state may always, in pursuit of its own interests, refuse its consent, and thus thwart the plain objects and purposes of the constitution."

Replying to the argument based on the sovereignty of the State over the land and water to be crossed by the bridge, Mr. Justice Bradley said (p. 19):

> "The argument based upon the doctrine that the states have the eminent domain or highest dominion in the lands comprised within their limits, and that the United States have no dominion in such lands, cannot avail to frustrate the supremacy given by the constitution to the government of the United States in all matters within the scope of its sovereignty. This is not a matter of words, but of things. If it is necessary that the United States government should have an eminent domain still higher than that of the state, in order that it may fully carry out the objects and purposes of the constitution, then it has it.
>
> * * *
>
> "And as one of these purposes is the regulation of commerce among the several states, and as that involves the needs and ways of intercommunication, it follows that congress may provide for these necessities whether the states co-operate and concur therein or not.
>
> * * *
>
> "The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the state, as they were by the king, *in trust,* for the public uses of navigation and fishery, and the erection thereon of wharves,

piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large.

* * *

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navigable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of congress, and congress may summarily remove such obstructions at its pleasure. And all this power is derived from the power 'to regulate commerce.' Is this power stayed when it comes to the question of erecting a bridge for the purposes of commerce across a navigable stream? We think not. We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient."

It was this case and the opinion of Mr. Justice Bradley therein to which Mr. Justice Gray re-

ferred in *Luxton* v. *North River Bridge Co.*, 153 U. S. 525, 532, where he said:

> "The reasons upon which the decision in that case rested were, in substance, the same as were stated by that eminent judge in two opinions afterwards delivered by him in behalf of this court, in which the power of Congress, by its own legislation, to confer original authority to erect bridges over navigable waters, whenever Congress considers it necessary to do so to meet the demands of interstate commerce by land, is so clearly demonstrated, as to render further discussion of the subject superfluous."

It should be noted that an appeal to this Court was taken in the Stockton case but that the same was dismissed. This dismissal was with costs, indicating that it was not by consent (140 U. S. 699).

About the time of the decision of the Circuit Court in the Stockton case a steamship owner engaged in navigating the waters of Staten Island Sound brought an action in the Circuit Court of the United States for the Southern District of New York to restrain the construction of the same bridge on the ground that it would interfere with navigation. The case is reported as *Decker* v. *Baltimore & N. Y. R. R. Co.* in 30 Fed. 723. Judge Wallace, in an opinion sustaining a demurrer to the bill of complaint and denying a motion for an injunction, said in part (p. 724):

> "*Whether the waters are wholly within the boundaries of a state, or, as here, lie between two states, is not material.* They are navigable waters of the United States, if they

form by themselves, or by uniting with others, a continuous highway for commerce with other states or countries. (Citing cases.)

"The power of control over such waters necessarily includes the power of deciding what structures are impediments to commerce; and, by an unbroken line of decisions, it is settled that the paramount authority regulating bridges that affect the navigation of the navigable waters of the United States is in congress.

"So long as this authority lies dormant, the states may authorize the erection of bridges over navigable waters within their limits, which may to some extent obstruct navigation, or, by concurrent action, may bridge the waters lying between them; but, so soon as congress intervenes and exercises its power of regulation, what has been done by state authority must give way to the paramount authority of congress. The power of the state ends where that of the nation begins.

* * *

"If the constitutional power of congress over the navigable waters of the United States is confined to a mere negation of state authority over them, if congress can only ratify and prohibit what the state proposes, if it has no faculty of independent action, and no vigor to originate, then, instead of being paramount, the power is practically subordinate to the power of the state. Yet it has never been doubted that, within the scope of its powers, the government of the United States is supreme, or that its authority, when asserted, is, to the extent asserted, of necessity exclusive.

"The constitution delegates to congress the power to prescribe the conditions upon

> which commerce in all its forms shall be conducted between the citizens of the several states, and to adopt measures to promote its development and prosperity. Bridges over navigable waters are necessary to facilitate transportation and commercial intercourse. They are well-recognized instrumentalities of commerce. The power to build them, or authorize them to be built, is an incident of the general power to regulate interstate commerce. If the national and state authorities disagree as to the expediency of bridging a river, and if, as is asserted, the power to act is partitioned between them, and can only be exercised concurrently, interstate commerce may be crippled. If congress deems a railroad bridge necessary or useful as an instrumentality of interstate commerce, there is no sound reason, aside from considerations of expediency, why it should not build one, or authorize a private corporation to do so." (Italics ours.)

In *Willamette Iron Bridge Company* v. *Hatch*, 125 U. S., 1, there was involved the effectiveness of an act of the Legislature of Oregon purporting to authorize the construction of a bridge across the Willamette River, a navigable waterway lying wholly within the State of Oregon.

The opinion was by Mr. Justice Bradley, and upheld the Oregon act as a proper exercise of the police power of the State. The learned justice, however, was careful to base the decision upon the ground that Congress had not assumed jurisdiction over the rivers of Oregon.

He said (p. 12):

> "We do not doubt that Congress, if it saw fit, could thus assume the care of said

streams, in the interest of foreign and interstate commerce; we only say that, in our opinion, it has not done so by the clause in question. And although, until Congress acts, the States have the plenary power supposed, yet, when Congress chooses to act, it is not concluded by anything that the States, or that individuals by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose. It is for this reason, namely, the ultimate (though yet unexerted) power of Congress over the whole subject-matter, that the consent of Congress is so frequently asked to the erection of bridges over navigable streams. *It might itself give original authority for the erection of such bridges when called for by the demands of interstate commerce by land; but, in many, perhaps the majority of cases, its assent only is asked, and the primary authority is sought at the hands of the State.*" (Italics ours.)

Finally, we have the case of *People* v. *Hudson River Connecting Railroad Corporation,* decided by the New York Court of Appeals in 1920 and reported in 228 N. Y. 203. The case closely parallels the present one and is therefore of especial interest in this case. It was an action by the people of the State of New York against the defendant railroad corporation to restrain it from constructing a bridge with two spans across the Hudson River, at a point one hundred miles north of the boundary line between New York and New Jersey, where the waters of the Hudson River were entirely in the State of New York.

The defendant corporation was chartered under the laws of the State of New York in 1913, and on April 28th of that year the Legislature of New York granted it permission to construct a bridge across the Hudson River between Castleton and Schodack Landing, together with the necessary viaducts and approaches, and to maintain and operate the same, providing, however, that "the spans of the said bridge shall be not less than three hundred feet in length in the clear from pier to pier." (Chapter 388 of the Laws of 1913.)

On March 13th, 1914, Congress passed an Act substantially as follows:

> "* * * Authority * * * is hereby granted to the Hudson River Connecting Railroad Corporation * * * to construct, maintain and operate a bridge, together with the necessary approaches thereto, across the Hudson River, at a point suitable to the interests of navigation between Castleton and Schodack Landing, in accordance with the provisions of the Act * * * approved March twenty-third, nineteen hundred and six." (The General Bridge Act hereinafter discussed.)

On May 2, 1917, the Secretary of War approved the plans for the construction of a bridge with *two spans* across the river at the point in question.

On June 1, 1917, the Legislature repealed the Act of 1913 above referred to and authorized the defendant corporation to construct a bridge with but a single span and without piers or abutments between the dykes, instead of the bridge mentioned in the Act thereby repealed (Chapter 713 of the Laws of 1917).

On April 9, 1918, the Legislature amended the general railroad law by providing that no bridge across the Hudson River shall be built until the plans are approved by the State Engineer and Superintendent of Public Works.

These several acts are chronicled in the opinion of the Court of Appeals at p. 214.

Notwithstanding the 1917 and 1918 action of the Legislature, the defendant corporation proceeded to construct a bridge according to the plans approved by the Secretary of War as above, whereupon the Attorney-General filed an information in the Supreme Court to restrain such construction, alleging that it constituted a trespass upon lands belonging to the people of the State of New York, a purpresture, and a public nuisance.

The railroad corporation set up the grant of Congress above referred to as giving it plenary authority to construct the bridge notwithstanding the withdrawal of its consent by the State of New York. The Attorney-General demurred and, the demurrer being overruled, took the appeal decided in the reported case. This appeal was dismissed and the judgment of the Supreme Court unanimously affirmed.

Judge Elkus, speaking for the whole Court, said (p. 215):

> "When Congress exercises its authority and acts within its power, all other authority which conflicts or interferes with the Federal power must fall, for the sovereignty of Congress is plenary. (Citing cases.)
>
> "Congress is given authority over interstate commerce in article I, section 8, of the

Constitution: 'Congress shall have power * * * to regulate commerce with foreign nations and among the several states and with the Indian tribes.'

* * *

"It is a comprehensive clause, including within its intent the instruments and means by *which interstate commerce* is or may be carried on, even if those means or instruments are such as are inherently within a *single* state, such as the wharf of a transatlantic line, or the tracks over which pass trains *en route* from state to state, or the engine used to draw those trains, be it used for ever so short a haul within the state, and if this authority extends to the tracks and the engine, though used wholly within the state, surely it also includes bridges over which both of these pass, and this is particularly true if that bridge cross a navigable stream, the first great recognized instrument of interstate commerce. * * *

* * *

"The authority of the United States over the navigable waters is that of a supreme sovereign in so far as the authority is necessary under the interstate commerce provisions of the Constitution. As to all navigable waters, it has succeeded to the *jus publicum* as held by the King of England and holds such waters in trust for all the people of the United States under the Constitution. Its rights when exercised or to the extent exercised are paramount to the same *jus publicum* held by the state of New York for the people of the state."

It was therefore concluded that the grant of Congress was all sufficient authority for the construction of the bridge, and the same having been

made to a corporation then possessing State authority to construct a bridge, no after action of the Legislature could destroy the right thus conferred by the Federal grant.

Appellants claim that the portions of the opinion of Judge Elkus quoted above were mere *obiter dicta* and quite unnecessary to the decision of the case; that the only holding in the case was that the State had not effectively substituted its veto for its previously given consent.

Assuming, but not conceding, that the court might have placed its decision on this ground, it is obvious that it did not do so. On the contrary, it placed it squarely on the Federal grant and held that this overrode any and all objections of the State whenever and however made. Recognizing, however, that such a grant must be made to a corporation competent to receive the same, the Court pointed out that the railroad company had such competency when the grant was made, and held that the Legislature could not thereafter destroy the grant by repealing the Act which made it possible for the railroad company to receive and execute it. It was in this connection that the Court used the language quoted on p. 53 of appellants' brief. Appellants, however, have omitted the introductory part of the statement which explains what they quote. The whole paragraph reads as follows:

> "As already shown, this defendant *intra vires* of the charter obtained the grant of a franchise to build a bridge at Castleton from Congress. The right of Congress to make this grant and to authorize this bridge was plenary, and in the exercise of that right it

> made this grant to a corporation then competent to receive and exercise it. Can the legislature of New York state interfere with the plenary power of Congress to authorize this bridge for interstate commerce by depriving the corporation, authorized and vested with a grant of franchise from Congress, of the power *intra vires* to avail itself of the franchise by subsequently imposing the penalty of injunction and forfeiture of its charter for exercise of the franchise? The answer must be in the negative." (228 N. Y., at p. 224.)

In the foregoing case Judge Elkus pointed out the distinction between the case before him and the International Bridge Co. case of which so much is made in appellants' brief (228 N. Y., at p. 221.)*

This distinction was that while Congress had given plenary authority to construct the bridge in the instant case, in the International Co. case it had merely consented to the construction of a bridge in pursuance of the provisions of an Act of the Legislature of the State of New York—thus recognizing the latter as the primary source of authority. That this distinction was well taken, is shown by the excerpt from the opinion of this Court in the International case quoted in the opinion of the Court below as follows (R., p. 109):

> "When Congress has acted we see no reason for not leaving the situation as Congress has seemed to leave it, if on the most critical examination we discover no intent to withdraw State control, but on the contrary an assumption that the control is to remain."

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* The International Bridge Co. case went to the Supreme Court from the New York Court of Appeals, and the decision of the Court of Appeals was affirmed substantially for the reasons given by that Court in its opinion.

It should be noted in passing that the grant of "original authority" to the Hudson River Company was in language identical with that contained in the grant to the Central Railroad of New Jersey in the Act of 1919.

The amazement expressed on p. 16 of appellants' brief at the method by which the Court below distinguished the International Bridge case from the present case, seems scarcely ingenuous. It is said that this distinction was that in the International case the United States had not exercised the power of eminent domain, implying, contrary to the fact, that in the present case it had done so. What the Court said was that in the International Bridge case the United States had not exercised the power of eminent domain; that the bridge was built in pursuance of the statutes of the State of New York; that Congress in that particular case had not chosen to exercise the power of exclusive control, but had left it to the State, so that the Court left the power of control just where Congress had left it.

It must be plain to anyone who can see at all that all the Court intended was to point out that in neither of the two ways by which Congress might have taken control of the situation had it chosen to do so.

Counsel cite a vast number of cases covering three pages of their index, mostly in support of the proposition (p. 27) (1) that "the concurrent consent of both State and Federal Governments is necessary before a bridge over navigable waters, wholly within one State may be lawfully erected"; or (2) of the proposition (p. 70) that "the power of Congress over navigable waters is

limited to their improvement for purposes of navigation, including the *removal* of obstructions." (The italics are the emphasis of counsel.)

We do not think it necessary to review these cases in extenso. None of them, we think, supports either of the propositions stated. Not one of them overrules or, so far as we can remember, even refers to the decisions hereinbefore cited as establishing the supremacy of Congress in the premises. There is of course no difference in the power of Congress to authorize a bridge over navigable waters dependent upon the interstate or intrastate character of such waters. The title of the States to the land under water within their domain, and their sovereignty over both the land and the water, is the same in either case.

That the power of Congress over navigable waters is not limited to navigation purposes, is evident from the fact that the power to regulate navigation is based on the power to regulate commerce as pointed out by Mr. Justice Bradley in the Stockton case (32 Fed., at p. 20). See also the opinion of the same learned Justice in *California* v. *Pacific R. R. Co.* (*supra,* p. 13).

The power of Congress under the commerce clause is no more limited to the "removal of obstructions" from navigable waters, than to any other subject committed to it by that comprehensive clause. As Mr. Justice Bradley said:

> "It is commerce, and not navigation, which is the great object of constitutional care." (32 Fed., p. 20.)

To concede either of appellants' propositions as above would be to involve the commerce of the

country in inextricable confusion and to give play once more to the State rivalries and State jealousies to get rid of which and their attendant evils the Constitution was adopted and the commerce clause inserted therein.

II.

The court did not err in construing the Bridge Act of 1906 and the Acts of August 8, 1919, and February 15, 1921, as together conferring upon the Railroad Company authority to construct the bridge in question without the consent of the State of New Jersey or any of its agencies.*

Appellants insist as above that a State, by virtue of its police power, and also of its inherent sovereignty, has the right to authorize the construction of bridges over intrastate waters, subject only to the power of Congress to prevent obstruction to navigation; that Congress has always recognized this right and has never, at least until 1906, attempted to supersede it or to prevent its exercise, and that the Bridge Act of 1906 ought to be construed, not as a reversal of this policy, but merely as a requirement, in the interest of navigation, that the consent of Congress shall be obtained before the State's franchise is exercised.

There can be no doubt that the States had the right, before Congress legislated on the subject,

* Appellants assert in their assignments of error that the Court of Appeals construed the Act of 1906 as alone giving authority. This is an error.

to authorize the construction of bridges over the navigable waters of the United States. Nor was this right confined to the authorization of bridges over intrastate waters. It was as fully recognized and as freely exercised with respect to interstate bridges as to those over waterways wholly within a State. And it is probable, as suggested by Mr. Justice Bradley in the Willamette case (125 U. S. 1) that a majority of the bridges over navigable waters in the United States were built under the authority of the States. Numerous instances, however, are given by him in the Willamette case (125 U. S. 13) and others in the Stockton case (32 Fed. 16) where the sole power emanated from Congress. Many other instances will also be found in the public laws since enacted.

The Arthur Kill bridge, which was the subject of dispute in the Stockton and Decker cases, was of course one of these. There Congress authorized the construction of the bridge not only without the consent of the States affected but against the solemn protest of the Legislature of the State of New Jersey (32 Fed. 12). And this was before Congress had passed any general legislation in restraint of the right of the States to authorize the construction of bridges over navigable waters.

The first general legislation passed by Congress restrictive of the right of States to authorize the construction of bridges over navigable waters is contained in the Rivers and Harbors Appropriation Act of 1890 (26 Stat. 426, 453). Sec. 7 of that Act contains the following provision:

> "It shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, causeway or other works over or in any port, road,

> roadstead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War."

There was a proviso to the effect that the Act should not be construed to authorize the construction of a bridge under an act of the legislature of any State over a "navigable water not wholly within the limits of such State."

The next important enactment on the subject is contained in the Rivers and Harbors Appropriation Act of 1899 (30 Stat. 1121, 1151). It is there provided as follows:

> "Sec. 9. That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

This is the last important Act bearing on the subject prior to the Bridge Act of 1906. The first section of the 1906 Act provides that:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That when, hereafter, authority is granted by Congress to any persons to construct and maintain a bridge across or over any of the navigable waters of the United States, such bridge shall not be built or commenced until the plans and specifications for its construction, together with such drawings of the proposed construction and such map of the proposed location as may be required for a full understanding of the subject, have been submitted to the Secretary of War and Chief of Engineers for their approval, nor until they shall have approved such plans and specifications and the location of such bridge and accessory works; and when the plans for any bridge to be constructed under the provisions of this Act have been approved by the Chief of Engineers and by the Secretary of War it shall not be lawful to deviate from such plans, either before or after completion of the structure, unless the modification of such plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

The second section reads as follows:

"Sec. 2. That any bridge built in accordance with the provisions of this Act shall be a lawful structure and shall be recognized and known as a post route, upon which no higher charge shall be made for the transmission over the same of the mails, the troops, and the munitions of war of the United States than the rate per mile paid for the transportation over any railroad, street railway, or public highway leading to said bridge; and the United States shall have the right to construct, maintain, and repair, with-

> out any charge therefor, telegraph and telephone lines across and upon said bridge and its approaches; and equal privileges in the use of said bridge and its approaches shall be granted to all telegraph and telephone companies."

Appellants call attention to the fact that this Act contains no repealer of existing legislation and insist that it ought not to be construed as repealing the right expressly accorded to the States by the Act of 1899 to authorize the construction of bridges across intrastate waterways without the consent of Congress, provided the location and plans are submitted to and approved by the Chief of Engineers and the Secretary of War.

They also cite cases holding that, in construing Federal statutes, the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserve powers of the State, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested.

We agree with all this. And we concede that the Act of 1906 did not repeal the Act of 1899 in whole or part, and did not supersede or suspend the right of the States to authorize the construction of bridges over navigable waters to the extent that it existed before the passage of the Act.

As we read the Act of 1906, all that was accomplished, or was intended to be accomplished, by it was the establishment of certain conditions which should attach to all future grants by Congress of authority to construct bridges over navigable waters, without the necessity of repeating such

conditions in extenso in each grant. This appears from the debates in Congress referred to by appellants and is also apparent on the face of the Act.

The argument, however, that the 1906 Act is limited to grants for the construction of bridges over interstate waterways only, is, we submit, without any basis whatever.

1st—No such limitation is to be found anywhere in the Act.

2nd—The Act in terms covers grants to construct bridges across or over *any* of the navigable waters of the United States—a designation certainly broad enough to include both interstate and intrastate waterways; indeed as broad as the jurisdiction of Congress over the subject.

3rd—Although Congress may have expected that authority to construct bridges over intrastate waterways would generally be obtained under the Act of 1899, there is nothing in the history of its legislation or elsewhere to indicate an intention to abdicate its function in that respect, or to withhold its hand whenever, on account of State interests, State jealousies, State prejudices or on any other account, it might seem desirable to put it forth.

4th—No argument, we submit, in favor of appellants' claim in this behalf can be drawn from the reports and debates in Congress, when the Bridge Act was under consideration. These are referred to by appellants as demonstrating the correctness of its position and a copy of the same is annexed to their brief at pp. 89-95. This refer-

ence seems hardly permissible, as there does not appear to be any ambiguity in the Act to explain.

However, the report of the committee having charge of the bill shows that it intended just what the Act provides. The report says (App. Br., p. 89):

> "The purpose of the bill is to establish uniform regulations in regard to the construction and operation of bridges over navigable waters when hereafter authorized by Congress."

The report goes on to say (App. Br., p. 91):

> "In order to establish uniformity in reference to the construction of bridges and also to economize the time of Congress and reduce the length of bills and statutes, your committee respectfully recommends the passage of the bill, which has been approved by the Secretary of War and the Chief of Engineers, with the amendments suggested by them."

Where, in this language, is to be found a limitation to bridges over *interstate* navigable waters? In view of the fact that Congress possessed the same power to authorize the construction of bridges over intrastate as over interstate waters, and had exercised that power whenever occasion seemed to require it, and of the further fact that the regulations proposed would apply as much to the authorization of the one class of bridges as to the other, how in reason can it be supposed that these regulations were intended to apply to one class only? Why establish uniformity and economize the time of Congress in the one and not in the other?

But the brief quotes and relies upon the remarks of Mr. Mann, who had charge of the bill, to the effect that the power to construct bridges over navigable waters, lying wholly within the limits of a State, must be derived from the State itself; that the Government does not interfere with the right to do this; in other words, that the power of the Government is not exercised to regulate interstate commerce, but to prevent the interference with navigation and navigable streams; that the Government merely waives its right in behalf of persons who must obtain their authority elsewhere.

It will, however, be noted that these remarks were not made in explanation of the bill presented by the committee, nor were they a declaration as to its effect if enacted into law. They were merely made in answer to a question by Mr. Garret as to the existing state of the law with respect to streams wholly within the limits of a State. Mr. Mann, of course, was not speaking for the committee when he made the remarks, nor could he have intended to say that the Government had permanently waived its right in the premises. What he said was a correct exposition of the Act of 1899 and nothing more.

5th—Congress has construed the Act of 1906 as applying to the construction of bridges over intrastate waterways by its grant to the Hudson River Connecting Railroad Co., already discussed, and also by its grant to the Central Railroad Company in the present case; unless, indeed, it regarded the waterways affected by these grants as interstate because the navigable portions thereof do not lie wholly within the limits of a single State.

Further, by reference to Chapters 2455 and 2456 of the Public Laws passed by the 59th Congress (Vol. 34, Part 1, p. 191) it will be found that the first two grants made by Congress in pursuance of the General Bridge Act authorized the South and Western Railway Company to construct bridges with single or double tracks and approaches thereto over and across the Clinch River and the branches thereof, in the State of Virginia, and over and across the Holston River and the branches thereof, in the States of Virginia and Tennessee. Both of these grants were approved May 12, 1906.

Two days later an Act was approved granting to the Minnesota, Dakota & Pacific Railway Company authority to construct, maintain and operate a railway bridge and approaches across the Missouri River in the State of South Dakota, in accordance with the provisions of the General Bridge Act (Same Vol., p. 193).

On May 16th an Act was passed authorizing the Kansas City, St. Joseph & Excelsior Springs Railway Company to construct a railroad, wagon and foot bridge across the Missouri River in Clay County, in the State of Missouri, in accordance with the provisions of the Bridge Act (Same Vol., p. 196).

On June 21st an Act was approved authorizing the Chattanooga Northern Railway Company to construct, maintain and operate a bridge across the Tennessee River at Chattanooga, in the State of Tennessee, in accordance with the provisions of the Bridge Act (Same Vol., p. 388).

On June 25th an Act was approved authorizing the Chicago, Milwaukee & St. Paul Railway Company of Montana to construct, maintain and operate a railroad bridge and approaches thereto across the Missouri River at some convenient and practicable point within the limits of Broadwater County, or between Broadwater and Gallatin Counties, in the State of Montana, in accordance with the provisions of the Bridge Act (Same Vol., p. 456).

Numerous other Acts of the same character were passed by the same Congress, and hundreds of them have been passed by subsequent Congresses.

Unless, therefore, every navigable river is to be regarded as an interstate waterway along its whole navigable length, in case it anywhere, for ever so short a distance, passes between two States, it would seem that Congress has applied the 1906 Act as well to intrastate waterways as to those lying between two or more States.

But if this is not the case, and the term interstate waterways is to be regarded as broad enough to include all portions of a river where some portion of it flows between two States, then it must follow that Newark Bay is an interstate waterway since a portion of its navigable waters flows between New Jersey and New York (*supra*, pp. 8-10). We then have a case where the 1906 Act admittedly applies.

Nor is there any force in the argument that in the Act of 1906 Congress used the words "authorized" and "authority" in the sense of "consent."

These words are used throughout the Act in apparent contradistinction to the word "consent"

as used in the Act of 1899, and full and final effect is given to compliance with the conditions annexed to the Federal grant, which of itself is inconsistent with the idea that further authority is to be obtained elsewhere which might of course annex other and perhaps inconsistent conditions.

But the authority of the Central Railroad Company to construct the bridge in question does not come from the Act of 1906, but from the Acts of 1919 and 1921, and the Act of 1906 is of account only as throwing light upon the meaning of the latter Acts and as supplying the conditions referred to therein.

It is obvious, of course, that Congress might have made the present grant without any reference to the Act of 1906, whatever the meaning or purpose of that Act may have been. And it is equally obvious that if the Congress which passed the Act of 1906 had intended that it should be used only in connection with grants for interstate bridges, the Congress of 1919 had a right to use it in connection with a grant for an intrastate bridge.

The important question, therefore, is as to the meaning of the Acts of 1919 and 1921. These Acts are not set out in the record, the complainants contenting themselves with a reference to the same in their bill of complaint together with a statement that the first *granted* to the Railroad *authority* to construct the bridge and the second extended the time for the commencement of the same, both in violation of the Fifth and Tenth Amendments to the Constitution of the United States (R., pp. 12, 13, 23).

The Act of 1919 was approved August 8th, 1919, and reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That authority be, and is hereby, granted to the Central Railroad Company of New Jersey, a corporation organized and existing under the laws of the State of New Jersey, its successors and assigns, to construct, maintain, and operate a bridge, and approaches thereto, across the Newark Bay, in the State of New Jersey, at a point suitable to the interests of navigation between the City of Elizabeth, in the county of Union, and the City of Bayonne, in the county of Hudson, in said State, in accordance with the provisions of the Act entitled 'An Act to regulate the construction of bridges over navigable waters,' approved March 23, 1906."

The Act of 1921 was approved February 15th, 1921, and reads as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the times for commencing and completing the construction of a bridge authorized by Act of Congress approved August 8, 1919, to be built by the Central Railroad Company of New Jersey across the Newark Bay between the city of Elizabeth and the city of Bayonne, New Jersey, are hereby extended two and five years, respectively, from the date of approval of this Act."

1. These acts are clear upon their face and there is no suggestion of a mere consent to be found in either of them. The first enacts *"that authority be, and the same is hereby granted"*

to the Railroad Company to construct, maintain and operate a bridge, and the second declares that the first *authorized* the construction of a bridge and merely modifies one of the conditions upon which the grant was made.

2. The language of the grant is identical with that in the Hudson River Bridge Company case, and the Court of Appeals of New York unanimously construed the grant in that case as conferring plenary authority. An application to this Court for a certiorari to review this decision was denied (254 U. S. 631).

3. Appellants' argument in this behalf, like so many other of their arguments, seems to be answered by the opinion of Mr. Justice Bradley in the Stockton case. There the Act provided:

> "That it shall be lawful for the Staten Island Rapid Transit Company, a corporation existing," etc., "to build and maintain a bridge across the Staten Island sound, or Arthur kill, from New Jersey to Richmond county, New York, for the passage of railroad trains," etc.

Justice Bradley said (32 Fed., p. 12):

> "The first question to be examined is the true construction of the act of congress on which the case arises,—the informant contending that it is merely permissory in its character; and the defendants, that it gives authority and power to build a bridge, without reference to any authority from the state. This question need not detain us long. The words of the act are broad enough to confer the authority, if congress had power to confer it. The language is: 'It shall be lawful for the Staten Island Rapid Transit Railroad

> Company,' etc., 'to build and maintain a bridge across the Staten Island sound, or Arthur kill.' This is the ordinary language used for conferring authority. Had the state legislature passed a law in these terms, there could not be a doubt of its sufficiency to give authority. And there are expressions in the act which imply that plenary authority was intended to be given. The minute directions laid down as to the manner of construction and use of the bridge imply this. The third section declares 'that any bridge *constructed under this act, and* according to its limitations, shall be a lawful structure,' etc.; implying that the construction of the bridge, when built, would be under the act. If congress had no power to authorize the construction of the bridge, independent of state legislation, the act would, of course, be properly construed as permissory in its character, ancillary to, or confirmatory of, state legislation which might be adopted for the purpose of authorizing such a bridge. In other words, the act, within the scope of its terms, may have such effect given to it as comports with the power of the legislative body which enacted it; just as a deed of conveyance may operate as a grant, a bargain and sale, a release, or a confirmation, according to the interest of the grantor on the one hand, and of the grantee on the other. The true construction of the act, therefore, depends on the power of congress, which will be examined hereafter."

4. As appears by the bill of complaint and the affidavits annexed, the Acts of 1919 and 1921 were passed in the face of known and violent opposition on behalf of the public authorities of the State of New Jersey and the City of Newark, and a bill for their repeal was introduced in Congress but failed of passage (R., pp. 11, 15, 47, 69). The

claim, therefore, that said Acts were intended as a mere consent to a grant by the State of New Jersey, which it was known would not be made, seems to lack even plausibility.

5. Words in a legislative act are to be construed in their natural sense and according to their generally accepted meaning (*Moore* v. *United States*, 249 U. S. 487, 489).

Webster's Dictionary defines the word "authorize" as follows:

> "To clothe with authority, warrant or legal power; to give a right to act; to empower; as to *authorize* commissioners to settle a boundary." *

It defines the word "consent" as follows:

> "To agree; to accord; to concur; to give assent or approval."

These are certainly the generally accepted meanings of the respective terms. In view of this, and seeing that Congress could either *authorize* or *consent* according to its will, how can it be said that in using one word it intended the other? If it had said "consent," would anyone argue that it meant "authorize"?

A reference to the statutes will show that Congress had given *consent* to the building of bridges in some cases and *authority* in others for a long time before the Bridge Act of 1906 was passed, and that it has continued this practice down to the present time. Thus, the 66th Congress, between May, 1919 and March, 1921 (covering the period

* The above definition of the word "authorize" is quoted and approved by this Court in *Blair* v. *Chicago*, 201 U. S. at p. 457.

of the grant to the Central Railroad Company of New Jersey) passed 49 Acts granting authority to construct and maintain bridges over navigable waters, and 29 which merely gave consent to such construction; and in the first session of the present Congress it granted authority for such construction in 23 cases and consent in 50 others. Surely it cannot be supposed that Congress indiscriminately used words so different in their ordinary meaning and acceptation.

III.

The allegations in the Bill of Complaint as to the obstructive character of the bridge, and as to the feasibility of building a tunnel, or re-routing the railroad traffic, are wholly irrelevant.

The determination of these questions is administrative in character and was committed by Congress to the War Department. The parties were fully heard before this Department and no appeal lies from its decisions to the Courts.

Pennsylvania v. *Wheeling Bridge Co.*, 18 How. 421, 430;
Miller v. *The Mayor of the City of New York*, 13 Blatch. 469;
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 635.

As was said by Mr. Justice Hughes in the last named case: "It is for Congress to decide what shall or shall not be deemed in judgment of law an obstruction to navigation."

IV.

But if the Railroad Company needs the authorization of the State of New Jersey to the construction of the bridge it has it.

The District Court affirmed this point (R., p. 92) but appellants' brief says that the Court of Appeals rejected it (App. Br., p. 10). The Court of Appeals did nothing of the kind. It approved the first two of the points upon which the District Court rested its decision and stopped there, as of course there was no occasion for it to go further.

Appellants further say that "the allegations in the bill (R., p. 16) that the proposed bridge has not received the State's consent are allegations of fact which are admitted by the motion to dismiss" (App. Br., p. 11).

But the bill also alleges that the present bridge was constructed and has been maintained pursuant to an Act of the Legislature of the State of New Jersey approved February 23, 1860, entitled "A further Supplement to an Act Entitled 'An Act to Incorporate the Somerville and Easton Railroad Company,' passed February 26, 1847" (R., p. 11). (Copy of this Supplement is annexed to Appellants' Brief, at p. 95.)

It also alleges that the new bridge is to be upon substantially the same location as the existing bridge and is to replace the same (R., p. 11).

In view of these allegations it surely is open to the Railroad Company to insist that it has authority from the State under the Act of 1860 not only to construct but also to maintain a bridge

at the point in question and that no new consent is necessary to the construction of the bridge in substantially the same location as the old one. Such rebuilding does not amount to a new taking of the State's land under water or in any way invade the State's sovereignty, since the charter of the Railroad Company is perpetual and the grant to it of a right to build and maintain a bridge is of the same duration.

But counsel argue that the proposed new bridge does not conform to the Act of 1860 in that it is designed with a vertical instead of a pivot draw and is to be set at a 66 degree angle to the main channel of the Bay instead of at right angles thereto, in consequence of which departure from the Act of 1860 the bridge cannot be justified thereunder.

To this there are several answers:

1. No objection of this kind was made in the bill of complaint or in the petition of the Attorney-General for leave to intervene. Neither does any such objection to the bridge appear to have been made to the Railroad Company, to the Board of Commerce and Navigation or to the War Department. We submit, therefore, that this claim comes too late.

2. There is no statement of fact to be found either in the bill of complaint or in the Attorney-General's petition of intervention upon which to base such an argument. The bill does allege that the present bridge crosses the channel of the Bay at an angle of approximately 66 degrees and that the Railroad Company has for years been seeking

authority to construct a substitute bridge upon substantially the same location as the existing bridge. It is silent, however, as to the angle at which the new bridge is to be placed under the direction of the War Department. Assuming, however, that the new bridge is to be set at the same angle as the old one, it does not follow, nor is it alleged, that it is not to be provided with openings having a width at right angles to the channel as great as the Act of 1860 requires. It will be observed that this Act does not require that the bridge shall be set at right angles to the channel but merely that there shall be two openings, each of seventy-five feet in width at right angles to the channel. Obviously, therefore, a bridge set at an angle of 66 degrees to the channel would still conform to the Act if its openings were sufficient to afford the statutory clearance parallel to the channel.

3. The requirements of the Act of 1860 in the respects now insisted upon could only have been inserted for the protection of navigation. But with respect to all matters affecting navigation the power of Congress is admittedly supreme. These requirements must therefore be considered as provisional and directory only, subject to supersession by Federal authority when and as occasion might require without impairment of the grant. It was therefore within the province of the Secretary of War, acting under the direction of Congress, to determine the angle at which the new bridge should be set and the character of the draws it should contain, and he having done this, the State can no more enjoin the Company from carrying out the plans so prescribed than

it could forfeit the Company's charter in *quo warranto* proceedings for having done so.

Alluding to this subject in their brief in the Court below, counsel for appellants said:

> "The State is simply withholding from the railroad permission to build any bridge, and the railroad is not being asked to comply with inconsistent requirements. If the Secretary of War assented to a bridge of a certain type, and the State said the bridge should be of another type showing less regard for the interests of navigation, or forbidding the adoption of the federal safeguards, there would be a case of conflicting requirements, and the State requirements, not being in aid of navigation, would fall."

As Judge Elkus said in the Hudson River Bridge Case (228 N. Y. at p. 225):

> "It lies not in the mouth of the legislature to defeat the power of Congress, properly exercised, by penalizing the defendant for exercising its franchise from Congress to accomplish a purpose over which Congress has plenary power."

Appellants further object that the consent of the Board of Commerce and Navigation to the construction of the new bridge has not been obtained, and that this is required by the laws of the State of New Jersey.

We submit there is no such requirement. The powers of this Board, whatever they are, were conferred by the Act of the Legislature creating the New Jersey Harbor Commission, approved April 8, 1914. This Act is set out in the bill of complaint and again in the Attorney-General's petition of intervention (R., pp. 14, 74).

The Board of Commerce and Navigation succeeded to the powers of the River and Harbor Commission under an Act of the Legislature approved April 8, 1915 (R., p. 75).

Referring to the Act of 1914 it will be observed that Section 4 provides that "*All plans for the development of any water front* upon any navigable water or stream of this State, or bounding thereon, * * * which involves the construction, change, alteration or modification of a * * * bridge * * * shall first be submitted to the said commission, and no such *development or improvement enumerated within the provisions of this section* * * * shall be commenced or executed without the approval of this commission first had and received" (Italics ours).

It will be noticed that it is not the plans for the bridge that are to be approved, but the plans for the development or improvement of the water front when such plans involve as an incident the construction, change, alteration or modification of a bridge. "How," as the District Court remarked, "can the replacement of a bridge along a railroad right of way possibly be regarded as a plan for the development of water frontage?" (R., p. 95). That the Act of 1914 was not intended to apply to such replacement is too obvious to need discussion.

Lastly appellants object that Congress, by creating and adopting as its instrumentality the Port of New York Authority, qualified the license granted to the Central Railroad Company of New Jersey by imposing, as an additional requirement, the approval of that body.

The bill of complaint alleges that in the year 1921, pursuant to authority granted by the States of New York and New Jersey, a compact or agreement was entered into between the States by which there was created a district to be known as the Port of New York District, which embraced among other things all the waters of Newark Bay; that there was furthermore created by said compact a body known as "The Port of New York Authority," consisting of commissioners chosen by the States of New York and New Jersey respectively, having the powers and jurisdiction enumerated in the compact, which compact was thereafter ratified by Congress by a Joint Resolution approved August 23, 1921 (R., p. 16).

It is further alleged that the compact provided that the Legislatures of the two States would adopt a plan for the comprehensive development of the Port of New York; that thereafter such a plan was adopted and approved by said Legislatures and was consented to by a joint resolution of Congress approved July 1, 1922, in and by which resolution Congress not only consented to the plan but authorized the Port of New York Authority to execute the same. This comprehensive plan it is alleged provided for the construction of certain tunnels and bridges to form part of the plan; that it also provided for the construction of certain belt lines, including a belt line known as "Middle Belt Line", to connect New Jersey and Staten Island and the railroads west of the port with Brooklyn, Queens, the Bronx and the railroads on the easterly side of the port (R., pp. 17, 18).

It is also alleged that the 13th Article of the compact provided that:

"The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other Federal, muncipal, State or local authority, administrative, judicial, or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article 10 for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering, or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port" (R., pp. 18-19).

And further that the 8th section of the comprehensive plan provided:

"The port of New York authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the Congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department, and the United States Shipping Board, for suitable assistance in carrying out said Plan.

> * * * It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan. All municipalities, within the district, are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate. * * * The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, * * *" (R., pp. 19-20).

The bill further states that:

> "The Joint Resolution of Congress aforesaid, approved July 1, 1922, referred to and approved the *bridges, tunnels and belt lines forming the comprehensive plan* which were generally and in outline indicated on the maps filed by The Port of New York Authority in the offices of the Secretaries of the States of New York and New Jersey and were in said Joint Resolution described in outline" (R., p. 20).

Paragraph XII of the bill states that the existing bridge of the Railroad Company and the proposed new bridge to be constructed by it were not made a part of the comprehensive plan and are not shown thereon, but are in conflict therewith, obstructive thereof and inimical thereto (R., p. 20).

Paragraph XIII states that the engineers of the Port of New York Authority expressly excluded from the development of such plan any bridge at the point in question, because such a bridge would

constitute an obstacle to the proper development of the Port of New York (R., p. 21).

The Port of New York Authority was made a defendant and answered the bill. Paragraph IX of its answer reads as follows:

> "The Port of New York Authority has not authorized the construction of the said proposed new bridge of the said Central Railroad Company of New Jersey and has taken no action thereon except as hereinbefore stated. The engineers of the New York, New Jersey Port and Harbor Development Commission and of The Port of New York Authority, in studying the problem of the port and in submitting the Comprehensive Plan, did not make the bridge route a part of any belt line system for the reason, first, that there was so great a density of traffic then and now passing over said brdge, both passenger and freight, that, in the opinion of said engineers, it would be undesirable to utilize said bridge as part of a belt line over which additional traffic could be carried; and, secondly, since the question of removing the said bridge or rebuilding the same or substituting a tunnel therefor had been under consideration for many years and the matter had not yet been finally disposed of, the engineers were of opinion that the said bridge route should not be made a part of the belt line system. The Port of New York Authority on the 27th day of July, 1922, wrote the War Department the letter of which a copy is hereto annexed, marked Exhibit G. Except as in this paragraph expressly admitted, or as qualified, the defendant denies the allegations of Paragraph XIII" (R., p. 57).

It will thus be seen that the Port of New York Authority denied the allegation of the 13th para-

graph of the bill to the effect that its engineers expressly excluded from the development of the comprehensive plan any bridge at the point in question *because such a bridge would constitute an obstacle to the proper development of the Port of New York, and gave a totally different reason for such exclusion.*

To this answer was annexed a copy of a letter addressed to the Port of New York Authority by the Acting Secretary of War, bearing date August 26, 1922 (R., p. 69). In this letter the Acting Secretary asked the Port of New York Authority to "make recommendation to the Secretary of War whether the development of the harbor and business affected both by land and by water, will be better served by the construction of a new bridge or by the elimination of any bridge across this portion of the Bay."

When this letter was written the Secretary had before him the application of the Railroad Company for the approval of its plans for the construction of a bridge pursuant to the grant of Congress.

The Port Authority replied to the Secretary's letter on September 8, 1922, declining to make any recommendation on the subject and referring the Secretary to the Board of Commerce and Navigation of the State of New Jersey (R., p. 71).

It will be observed that the assertions of the bill to the effect that the proposed bridge is in conflict with the comprehensive plan, obstructive thereof and inimical thereto, is not supported by any fact set out in the bill or to be found elsewhere in the record, and is not endorsed by the Port of New York Authority. As a mere un-

supported assertion of the pleader it is not, we submit, admitted by the motion to dismiss.

The comprehensive plan is not annexed to the bill and was not put into the record. All we are told about it is that it provided for the construction of certain bridges and tunnels and railroad belt lines, "including a belt line known as 'Middle Belt Line,' to connect New Jersey and Staten Island and the railroads on the westerly side of the port with Brooklyn, Queens, the Bronx and the railroads on the easterly side of the Port" (R., p. 18).

It is not alleged that the Bay bridge will interfere with the construction of any of these works. Indeed to anyone acquainted with the geography of the section it must be apparent that the bridge is miles away from them and from the port of New York which they are designed to serve.

But the theory of the appellants seems to be that something, somewhere, in the comprehensive plan deprived the States of New York and New Jersey and the Congress of the United States of the power to authorize any bridge over the North River, the East River, Newark Bay, or any other of the waters of the port district, without the consent of the New York Port Authority; or at least required such consent before any grant by any of them should become effective.

When it is understood that this district, as pointed out in the opinion of the District Court, runs as far north as Irvington on the Hudson, N. Y.; as far east as Long Beach, Long Island; as far south as Atlantic Highlands, and as far west as Summit, N. J., it will be seen how extensive this claim is.

Surely if the plan contained anything of a sort so remarkable, it was incumbent upon the complainants to set it forth, and their failure to do so is potent evidence of its non-existence.

Appellants say in their brief (p. 83):

> "It is clear that the state of the law upon the adoption of the Joint Resolution of August 23, 1921, is that no bridge over navigable waters in the Port of New York District can lawfully be constructed unless the consent of the Port of New York Authority, or of the State where the bridge is to be built, is obtained."

We submit that this is not clear at all; that on the contrary nothing contained in the part of the Port plan as set forth in the bill of complaint even tends to support such an assertion. Appellants seem to concede that the State where the bridge is to be built may authorize such construction without the consent of the Port Authority. But if the States may do it, why may not Congress?

Congress annexed to its approval of the Port Plan the following (42 Stat., 822, 826):

> "*Provided,* That nothing herein contained shall be construed as impairing, or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

Surely, therefore, if the grant to the Railroad Company had been made *after* the approval of the Port Plan and without referring to it, the plan would not have affected the grant or been read into it.

But appellants argue that because the grant *preceded* the plan and the approval thereof by

Congress, the effect of such approval was to qualify the grant notwithstanding it is nowhere referred to therein. To such lengths are the appellants driven by the exigency of their case! To state the argument is to answer it. As well might it be claimed that the mere approval of the Port Plan by Congress imposed upon every grant it had ever made to construct and maintain a railroad or highway bridge over navigable waters within the Port District, the requirement that such bridge should not be built, or if built and thereafter destroyed by lightning, tempest, collision, the public enemy, or otherwise, should not be restored unless the Port Authority should consent thereto. This would be an abdication of the functions of Congress with a vengeance! For it must be remembered that the Port of New York Authority is a State agency composed of Commissioners appointed by the States who may be changed from time to time as the States elect, without Congress having any voice in the matter.

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed with costs.

Dated October 31, 1924.

CHARLES E. MILLER,
Solicitor for Defendant-Appellee,
The Central Railroad Company
of New Jersey.

CHARLES E. MILLER,
RICHARD V. LINDABURY,
of Counsel.

[redacted]

IN THE

Supreme Court of the United States

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IN THE

Supreme Court of the United States

THE CITY OF NEWARK, THE CITY OF JERSEY CITY and THE STATE OF NEW JERSEY, Appellants, against THE CENTRAL RAILROAD COMPANY OF NEW JERSEY and THE PORT OF NEW YORK AUTHORITY, Appellees.	October Term, 1924 No. 351

BRIEF ON BEHALF OF THE PORT OF NEW YORK AUTHORITY.

INTRODUCTORY STATEMENT.

Although The Port of New York Authority (hereafter referred to in this brief as the Port Authority) is nominally a defendant-appellee, the answer discloses clearly that, in effect, it appears as *amicus curiae,* praying (fol. 174) that the Court "determine its legal duties in the premises" and expressing "its readiness and willingness to pass upon any application for a permit to build such bridge [the bridge in question] if the Court shall determine that, under the acts of the Legislatures of the States

of New York and New Jersey and of the Congress of the United States, such permit is required."

It conceives it to be its official duty to aid the Court in an understanding of the history and purposes of the legislation under which it is proceeding and which in this litigation is brought before the Court for the first time. It appreciates the commendation of the District Court in referring to its attitude in this litigation in the following words (fols. 286-287):

> "* * * the Port Authority, apparently directed by men of vision, has proceeded, so far as endeavoring to secure power is concerned, with commendable caution. In the present situation the Port Authority has not asserted itself in any way. It is brought into court as a defendant and states that if it has any duties to perform in the premises it will gladly perform them."

For the guidance of the Court, counsel may say that, in his opinion, any jurisdiction which the Port Authority may have over the bridge in question or any duty with which it may be charged in relation thereto is to be found in one of two documents, either the compact between the two States defining generally the jurisdiction and powers of the Port Authority, or in the principles of the Comprehensive Plan which are set forth in Section 1 of the statutes of the two States and the Congressional resolution adopting the plan. The bridge is nowhere mentioned specifically. In determining whether any duty is placed upon or power is given to the Port Authority, it is clear that the directions of the compact and of the Comprehensive Plan being general in scope, light upon their specific application must be sought in the historical development of the compact and statutes and the studies submitted to the legislatures which preceded their adoption.

For these reasons this brief is neither a brief for an appellant nor for an appellee. It is intended to furnish, in convenient and summary form, the legislative history and the surrounding circumstances through which the Port Treaty and the Port Authority came into existence, further to aid the Court in understanding the nature and extent of the "Comprehensive Plan for the Development of the Port of New York" and the legislation imposing upon the Port Authority the Federal and State duty of effectuating the plan, and to determine whether the Port Authority is charged with any duty in the premises.

For the convenience of the Court, we have printed as an appendix to this brief the compact, the legislation authorizing it, the legislation approving the Comprehensive Plan, and such other legislation relating to the Port Authority as could in any way be pertinent.

Historical Relations Between New York and New Jersey.[1]

Prior to the New York Harbor Case in 1916, there had arisen other disputes between the States of New York and New Jersey, centering around the harbor of New York.

In the early history of the two States there was an almost continual dispute over title to the waters of the harbor.[2] Attempts to settle the dispute by arbitration

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[1] Fuller reference to this history will be found in the compendious report of the New York, New Jersey Port and Harbor Development Commission, dated December 16, 1920, chapter 1 of Part II, page 41 *et seq.*, Part III, compact between New York and New Jersey for the creation of a port authority and the comprehensive development of the port, page 435 *et seq.* A copy of the report will be found in the library of the Court.

[2] By virtue of the original grant, New York claimed title to high water mark on the New Jersey shore, while New Jersey contended that, by the Revolution, she had conquered sovereignty to the middle of the river. The history of the boundary dispute between the two States has been well told in two cases: *Central R. R. of N. J.* v. *Jersey City,*

were unsuccessful and litigation failed to terminate it.[3] In 1833, however, a treaty was negotiated and confirmed by Congress, which gave New York exclusive jurisdiction (as distinguished from sovereignty) over a portion of the waters and granted the same rights to New Jersey over the balance.[4]

The case of *Gibbons* v. *Ogden,* 9 Wheat. 1, also arose out of conditions in the Port of New York, as a result of the monopoly attempted to be conferred upon Livingston by the State of New York.

In 1908 the State of New York sued the State of New Jersey to restrain the construction of a sewer by a New Jersey commission, calculated to discharge sewage into the bay, to the injury of New York. In its decision, the United States Supreme Court made the suggestion that the solution could better be reached "by co-operative study and by conference and mutual concession" rather than by litigation (*New York* v. *New Jersey,* 256 U. S. 296; 65 L. Ed. 937, at p. 945).

The New York Harbor Case.[5]

It was the litigation and decision in the proceeding known as the New York Harbor case which was the occasion for and gave the impetus to the joint study from

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70 N. J. L. 81 (1903); *State* v. *Babcock,* 30 N. J. L. 29 (1862). Judge Elmer, who wrote the decision in the latter case, was in fact one of the Commissioners who negotiated the Treaty of 1833-34. Decisions in analogous cases were hostile to New Jersey's claim. *State* v. *Davis,* 1 Dutcher (N. J.) 386 (1856); *Handley's Lessee* v. *Anthony,* 5 Wheat. 374 (1820).

3 3 Pet. (U. S.) 461 (1830); 5 *id.* 283 (1831); 6 *id.* 323 (1832); see summary of bill in 108 U. S. 406-410 (1882).

4 Ch. 8, Laws of New York, 1834; Laws of New Jersey, 1833-34, p. 118. The treaty in full and the interpretations placed thereon will be found in chapter 1 of Part II, page 42 *et seq.,* of the Bi-State Commission Report, referred to in Note 1, page 3, *supra.*

5 47 I. C. C. 643.

which resulted the creation of the Port Authority and the adoption of the Comprehensive Plan. The circumstances of the case, the complaint made and the decision are of the greatest importance in the interpretation of the legislation under which the Port Authority acts.

In 1911 Governor Wilson of New Jersey appointed a commission of three members to study the problem of port development. A similar body from New York co-operated. Following the reports of the New Jersey Commission and its successors to the Legislature of that State, a committee joined with the New Jersey Board of Commerce and Navigation and with the cities of Newark, Hoboken, Jersey City and Elizabeth, instituted a proceeding before the Interstate Commerce Commission entitled "Committee on Ways and Means to prosecute the case of alleged railroad rate and service discrimination at the Port of New York, Board of Commerce and Navigation of the State of New Jersey, the City of Newark, City of Jersey City, the City of Hoboken, and the City of Elizabeth, all in the State of New Jersey, v. The Baltimore & Ohio Railroad Company, et al.," which is officially known as the New York Harbor Case, No. 8994.

This case aroused great opposition on the part of the State of New York, the City of New York and various civic and commercial bodies. The Chamber of Commerce of the State of New York in an intervening petition filed on the 19th day of October, 1916, alleged that the proceeding was

> "instituted for the purpose of shifting the basic center of the commerce of the Port of New York and thus artificially to stimulate the transfer of commercial and industrial advantages to the State of New Jersey, but to the great disadvantage of the city and state of New York."

The State of New York, intervening in the proceedings by the Attorney General, alleged that:

> "To break up the present Port of New York into two parts—one a Jersey and one a New York port—is to abandon the policy of co-operation and of friendliness that for over a century has existed between the two States, and to develop a rivalry disadvantageous to both."

The City of New York, intervening in the litigation, charged

> "that the complaint in this proceeding proposed a reorganization of the Port of New York as a whole in favor of the complainants, and to the damage of the petitioner, and which would give to the complainants certain advantages."

In the proceeding before the Interstate Commerce Commission much testimony was taken, many exhibits filed and the history of the relationship of the States of New York and New Jersey gone into with considerable detail. The complainants contended that the whole organization of the port was fundamentally wrong. In their complaint they alleged:

> "Under the unscientific and uneconomic methods practiced by the carriers, and before referred to, the business of the Port of New York has been developed along wholly artificial in lieu of natural lines. The result is that the City of New York has become so congested with traffic, and the price of land, owing to this artificially created demand, has risen so high, that the expense of conducting business on Manhattan Island has become excessive. High rents, high taxes, high insurance rates, congestion of the streets, congestion at the pier stations and shipping yards of the railroads, the wasteful methods in handling and rehandling all foodstuffs consumed, the value of which is estimated at more than

> $700,000,000 per annum, with the consequent heavy cost of drayage, estimated at $50,000,000 per annum, the loss to the railroads themselves in carrying goods across the Bay and back again, in some cases only for storage, are all a burdensome tax upon business conducted at this port, which can only be completely removed by the reorganization of the Port as a whole, and utilizing the advantages of the New Jersey shore and navigable waterways near its great Port."

The complainants (New Jersey) further contended that the condition

> "affects not only the Port of New York, but practically the entire industrial situation in the United States, as the excessive cost of doing business at the Port of New York under existing conditions, affects all of the industries of America whose products pass through or come to the Port for distribution. The problem therefore is really a national one, and is not confined solely to a local situation. It involves the handling of many times the maximum amount of tonnage that is estimated will go through the Panama Canal."

To solve the problem they urged specifically the creation of a new rate zone, either putting New Jersey substantially on the Philadelphia basis or at least establishing a lower rate to the western than to the eastern side of the harbor.

In opposition to the position of New Jersey, New York took the position that the metropolitan district was a natural rate zone; that historically, geographically and commercially it was one district and that the port "should not be split." One of the tables showed that the center of population of New Jersey had remained constantly within the northern counties of New Jersey. Other tables submitted by New York indicated a significant parallelism

in the growth of the northern counties of New Jersey with that of New York, thus showing the economic unity of the whole territory, "the Metropolitan District."

The Interstate Commerce Commission declined to disturb the existing rate situation, nevertheless stressing the dangers inherent in the existing situation, diagnosing them with acuteness and scientific precision.

> "The complainants' contention that the methods of handling both domestic and export traffic at the Port of New York *must be thoroughly revised if the maximum of efficiency is to be attained is abundantly established by the evidence of record.*
> * * *
>
> "*We cannot with propriety overlook the fact that the terminal problem at the port of New York is due in no small measure to competition between the railroads.* With convenient through routes available to the shipping public over the lines of all the carriers, and with the same rates of freight applying over all the routes, practically the only field of competition left to the railroads is that provided by their separate terminal operations. A shipper will employ the services of the carrier which offers him the most convenient facilities for the receipt and delivery of his shipments. It is this rivalry between the railroads in the matter of terminal service that has induced them to lay hold of almost every available foot of land on the New Jersey side of the harbor. It is this rivalry that prevents the establishment of reciprocal switching arrangements and joint terminal operation on the New Jersey shore, and for the difficulties encountered in endeavoring to persuade the railroads to construct freight tunnels under the river between New Jersey and Manhattan. *And it is this rivalry that tempts the carriers to invest large sums in new terminals for their individual use instead of uniting in a common effort to solve in a larger way a problem whose solution can never be attained as long as the present policy of unrestrained competi-*

> *tion is continued.* It is not too much to expect that the defendants will take immediate steps to reorganize and co-ordinate their terminal facilities at the port. There can be no justification, especially in a time of national emergency, for a policy that permits certain terminals to be congested with a surplus of freight while at the same time a nearby terminal has not enough traffic to keep it busy. *It is necessary that the great terminals at the port of New York be made practically one, and that the separate interests of the individual carriers, so long an insuperable obstacle to any constructive plan of terminal development, be subordinated to the public interest."*

The Commission directed attention to "the difficulty of attaining a physical co-ordination of facilities at the port, and administering them as an organic whole," and said that this was

> "attributable in part to the nature of the harbor and to the fact *that the opposite sides of the port lie in different states.* * * * the fact that the port is thus divided into two parts by a state line cannot be overlooked by those who would understand its history and the problem confronting those who are interested in its development."

The Creation of the New York, New Jersey Port and Harbor Development Commission.

The New York Harbor Case precipitated serious discussion of the problem of the organization of the port as a whole. Practically every trade and civic body within the Metropolitan District became interested. All the cities and organizations along the Hudson intervened in the proceeding. The New York press attacked New Jersey for attempting to "split the Port of New York." The New Jersey press attacked New York for its "selfishness and

narrow-mindedness." The educational influence upon all of the participants resulted in bringing about a conception of larger gains through the co-operation of the two States.

Thus it came about that the Governor of the State of New York[6] and the Governor of the State of New Jersey[7] recommended to the Legislatures of the two States respectively, in 1917, that the task of developing the Port of New York be undertaken as a "joint task" by the two States; more especially since[8] the Interstate Commerce Commission had held that "the Port of New York is historically, geographically, and commercially one port * * * any congestion in the port at any one point affects the whole port," and that "Haphazard, piecemeal attempts to solve the terminal problem at the port will hinder, not hasten, the desired solution."

Chapter 426 of the Laws of 1917 of the State of New York and Chapter 130 of the Laws of 1917 of the State of New Jersey established in each State "a commission to act jointly with a similar commission" of the other "in the investigation of Port conditions at the Port of New York and to submit a comprehensive report recommending the proper policy that shall be pursued for the best interests of the entire Port of New York, and the legislation, State and Federal, that will be necessary to make such recommendation effective." They directed each Governor to appoint three commissioners, who were to have power on the part of the State to meet commissioners appointed by similar action of the Legislature of the other State,

> "to negotiate or agree upon a joint report, recommending a policy to be pursued by the State of New York, the State of New Jersey and the United States by legislative enactment *or treaty* or other-

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[6] Hon. Charles S. Whitman.
[7] Hon. Walter E. Edge.
[8] Governor Whitman's message, Feb. 18, 1918.

wise, to the end that said Port shall be efficiently and constructively organized and furnished with modern methods of piers, rail and water and freight facilities and adequately protected in the event of war. Before making such report, such Commission shall make a thorough investigation of Port conditions in this country and shall take and employ such engineering, legal or other professional skill and assistance as it may need for the effective working out of a comprehensive and adequate interstate and Federal Port policy, to meet commercial needs in times of peace and the protection of the harbor and adjacent localities in times of war."

The Commission organized August 1, 1917, as a joint Commission. Early in 1918, in a Preliminary Joint Report, it expressed the belief that a period of two years and an expenditure of $400,000 would be required for its investigation. In round figures, it obtained and kept within the appropriation of $400,000, the States expending later, as we shall see, $100,000 for the further study of the plans of the Commission.

The Report of the New York, New Jersey Port and Harbor Development Commission.

The final report, embracing 495 pages and 12 maps and charts, consists of three parts and twelve appendices, Part II consisting of thirty-three chapters. It has since been referred to as the greatest engineering study ever made of port and harbor facilities.

The report began with the sentence: "A serious situation confronts the Port of New York," and it treats the problem not as one merely "for the concern of public officials, directors of railroads, steamship companies and other terminal enterprises," but as "a great sociological problem of chief concern to the public at large." In 1920

the Port and Harbor Development Commission found that the Port District included some eight million people. About eight per cent. of the population of the United States would, therefore, be directly and vitally affected in its daily life by any solution proposed. Just as vitally affected were the shippers and consignees of the traffic passing through the port, which in 1914 exceeded 76,000,000 tons.

The Bi-State Commission found that the port problem *"is primarily a railroad problem"* and that while "Navigable water, or water easily made navigable, reaches into nearly every part of the Port District * * * rail accessibility and co-ordination therewith are lacking at many points. *Therefore the comprehensive plan to evolve which this Commission was created is essentially a railroad plan."*

It thereupon recommended a completely *"remodelled terminal railroad system,* bringing every railroad of the Port to every part of the Port, and thus giving every part of the Port opportunity to develop and to have the economical transportation service needed for its commercial and industrial growth and expansion." This constituted the "Comprehensive Plan." It aimed "to provide for the development of the Port both for the immediate future and for many years to come."

The Report on Newark Bay and Its Bridges.

In the chapter dealing with Newark Bay (the special part of the port involved in this litigation) the Bi-State Commission said:[9]

> "Newark Bay is at present served by a channel which runs diagonally from a draw span near the east end of the bridge of the Central Railroad of

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[9] Pages 368, 369.

New Jersey to a more central position farther north. The bay is reached by a 20-ft. channel in the Kill van Kull, a sharp turn being required at the junction of the two channels. A project is now under way for deepening the channel to 30 ft. and widening it to 400 ft. for the entire length of the bay.

"This project when completed will hardly meet the needs of the bay and its tributary rivers. The city of Newark, through its Port Newark terminal development created some years ago, has made a substantial beginning to the opening up of the west side of Newark Bay for shipping. The city of Jersey City is planning a development along similar lines on the east side of the bay and the lower Hackensack River. Shipbuilding plants were established at the head of the bay during the war, and there is every reason to look for the location of other industries along the navigable waters of this section of the Port as soon as the railroad facilities provided in the comprehensive plan are available.

"Channels should be dredged by the Federal Government along the pierhead lines on both sides of the bay, and ultimately the entire bay should be dredged to the depth of the projected channel. The shoal off Bergen Point should be removed so that ships entering the bay from Kill van Kull can turn close to the point.

"The bridges across Newark Bay present a problem. In their present form they are a serious obstruction to navigation, yet they are important links in the railroad system of the Port, and cannot be ruthlessly destroyed.

"The Central Railroad of New Jersey is planning to rebuild in the near future its bridge across the south end of the bay, providing longer and higher fixed spans and wider openings at the lift spans. Before a positive decision is reached the Commission urges that full consideration be given to the replacement of the bridge by a tunnel, as has been advocated. If this is impracticable, the bridge should be rebuilt at once in accordance with a de-

sign providing for the minimum of interference with land and water traffic, as the present structure is a serious menace to navigation and deterrent to the proper development of the bay."

The Port Treaty or Compact between New York and New Jersey for the Development of the Port.

The Bi-State Commission had not proceeded very far in its study of the port problem without a realization that the legal phases of the problem required very careful study. Such a study was made and is to be found in the "Preliminary Report of Counsel to Accompany the Tentative Draft of Proposed Treaty Amendatory and Supplementary to the Treaty of 1834."[10]

The Bi-State Commission concluded that the structure of the Port Authority for the Port of New York should be built upon a compact or treaty supplementing the New York, New Jersey treaty of 1834.

The history of the evolution of this document is to be found in Part III of the Bi-State Commission's report, page 436 *et seq.* The legal aspects of the problem, as presented to the two States, will be found discussed at page 444 *et seq.* In the evolution of the port compact or treaty the Bi-State Commission was assisted by two special legislative commissions, appointed, respectively, by Governor Edge in New Jersey and Governor Smith in New York.[11] This Bi-State Legislative Commission, supplementing the work of the Bi-State Port Commission, finally agreed upon the compact in its revised form.

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[10] Annexed to the Progress Report of the Commission for 1919 (Legislative Document 103, New York).

[11] See pages 436, 437, Report of New York, New Jersey Port and Harbor Development Commission.

The complete report of the New York, New Jersey Port and Harbor Development Commission was presented to the Legislatures of both States under date of December 16, 1920. Governor Miller, addressing the Legislature, said in a special message:

> Two matters are thus presented for legislative action of the two States, viz.:
>
> 1. Authorization of a compact for the creation of a Port District and the establishment of a Port Authority with defined powers and duties, and
>
> 2. The approval of the Comprehensive Plan.
>
> Naturally, before approving the plan for so important an undertaking, the legislatures of the two States will carefully consider it. Whilst expert knowledge is required to pass upon many of its features, I do not hesitate to commend the work of the Commission in the highest terms.
>
> However, no narrow or provincial view should be permitted to delay action on the proposed compact. * * *
>
> *The problem is not a local problem. It is not even a joint State problem alone, because its solution will involve and even require the exercise of federal power. It is important for the two States to agree speedily upon a policy of co-operation, and it may be advisable thereupon to secure the approval of Congress, which may become important.*
>
> * * * * * *
>
> *The conclusion is irresistible that there must be a single Port District and a single Port Authority created by the joint action of the two States.*
>
> *As that much is plain, I recommend prompt legislation authorizing the making of a compact in the form recommended by the Commission. That will establish the principle of joint action and lay the foundation for an undertaking of vast moment to all the inhabitants of the two States.*

The Provisions of the Treaty.

This treaty is the first document in which is to be sought any power or duty of the Port Authority relating to the bridge in suit. It must, therefore, be read with some care.

In the recitals, reference is made to the great changes that have come about in the commerce of the port since the Treaty of 1834 between the two States and "the territory in and around the port has become commercially one center or district"; that "a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York, will result in great economies, benefiting the nation," as well as the two States, and that the future development of such facilities would require the expenditure of large sums of money "and the cordial co-operation of the States of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans"; and that such a result can best be accomplished through "the co-operation of the two States by and through a joint or common agency."

Article I contains the solemn pledge of each State to the other of "faithful co-operation in the future planning and development of the port of New York," the States "holding in high trust for the benefit of the nation the special blessings and natural advantages thereof."

Article II creates the "Port of New York District," which, escaping here the terminology of metes and bounds, in the language of the District Court, "runs as far north as Irvington on the Hudson, New York, as far east as Long Beach, Long Island, as far south as Atlantic Highlands and as far west as Summit, New Jersey." (The map of the Port District, containing the Comprehensive Plan, forms a part of the legislation and is on file in the offices

of the Secretaries of State of New York and New Jersey. Copies will be found in the Appendix.)

By Article III there is created "The Port of New York Authority," for brevity referred to throughout as the "Port Authority," which it is provided "shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the Legislature of either State concurred in by the Legislature of the other, or by act or acts of Congress, as hereinafter provided."

Article IV provides for the method of selecting the Commissioners of the Port Authority. They consist of "three resident voters from the State of New York, two of whom shall be resident voters of the City of New York, and three resident voters from the State of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, * * *."

By Article VI the Port Authority is vested

> "with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it."

But no State or municipal property is to be taken by the Port Authority without the owner's consent, nor does the law impair any State or municipal bonded indebtedness or provisions of law relating thereto.

In the definitions (Art. XXII), *"Transportation facility"* is defined as including railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car floats, lighters, tugs, floating

elevators, barges, scows or harbor craft of any kind, aircraft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property. *"Terminal facility"* is defined as including wharves, piers, slips, ferries, docks, dry docks, bulkheads, dock walls, basins, car floats, float bridges, grain or other storage elevators, warehouses, cold storage, tracks, yards, sheds, switches, connections, overhead appliances, and every kind of terminal or storage facility now in use or hereafter designed for use for the handling, storage, loading or unloading of freight at steamship, railroad or freight terminals. *"Railroads"* is defined as including railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, sub-stations, lines for the transmission of power, car barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment. *"Facility"* is defined as including all works, buildings, structures, appliances and appurtenances necessary and convenient for the proper construction, equipment, maintenance and operation of such facility or facilities or any one or more of them. *"Real property"* is defined as including land under water, as well as uplands, and all property either now commonly or legally defined as real property or which may hereafter be so defined. *"Personal property"* is defined as including choses in action and all other property now commonly or legally defined as personal property or which may hereafter be so defined.

So read, the Port Authority has substantially power to own and operate any conceivable kind of transportation or terminal facility.

The powers granted by Article VI, however, were subject to the following condition:

> "The powers granted in this article shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port as hereinafter provided."

Carrying out the recommendations of the Bi-State Commission, Article X provided:

> "The legislatures of the two states, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the port of New York."

By Article VII it is provided that it shall have such additional powers and duties as may be delegated to it from time to time by the action of the Legislature of either State concurred in by the Legislature of the other, but shall not pledge the credit of either State except by and with the authority of the Legislature thereof.

By Article XIII the Port Authority is authorized to

> "petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the Comprehensive Plan as provided for in Article X for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and

> transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port."

By Article XVIII it is authorized

> "to make suitable rules and regulations not inconsistent with the Constitution of the United States or of either State, and subject to the exercise of the power of Congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the Legislatures of both States, shall be binding and effective upon all persons and corporations affected thereby."

By Chapter 151 of the Laws of New Jersey, 1921, and Chapter 154 of the Laws of New York, 1921, commissioners and officials from each State were authorized to execute the agreement or compact for the development of the port in the language now appearing in the port treaty. The treaty was signed on the 30th day of April, 1921.

The commissioners were, by their respective Legislatures, authorized (Sec. 4) "to apply to the Congress of the United States for its consent and approval of the agreement or compact," but it was further provided that "until the same shall have been secured, the said agreement or compact shall be binding upon the State * * * in all respects permitted by law for the two States of New York and New Jersey without the consent of Congress to cooperate, for the purposes enumerated in said agreement or compact, and in the manner provided therein."

The Congressional Resolution of 1921.

The commissioners did apply to the Congress of the United States, and by Public Resolution No. 17, 67th Congress, S. J. Res. 88 (Appendix, p. 67 *et seq.*), Congress gave its consent "*to the said agreement, and to each and*

every part and article thereof," with the reservation that "nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement" and "That the right to alter, amend or repeal this resolution is hereby expressly reserved." The resolution of Congress was approved by the President on the 23rd of August, 1921.

The Secretary of War, in advising Congress to pass the resolution, said:

> "The adequate improvement and development of port facilities at New York is a deserving enterprise, and if the work is accomplished on the comprehensive plan of co-operation contemplated by the two States it will doubtless result in benefit to the transportation interests of the entire Nation. I recommend, therefore, that Congress give its consent to the agreement."

The report of the Committee on the Judiciary of the House, in recommending the passing of the resolution, said:[12]

> "Recommendations Nos. 2, 3 and 4 make up the comprehensive physical plan, the improved railroad terminal system which will be the backbone of a rational port development, and the formal adoption of which, in conjunction with the compact, the commission urges upon the legislatures. The economic sequence of construction should be determined by the Port Authority."
>
> "Historically, geographically, and commercially, New York and the industrial districts in the northern part of New Jersey constitute a single unit, a great metropolitan district of more than 8,000,000

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[12] Report submitted by Mr. Goodykoontz, from the Committee on the Judiciary, to accompany H. J. Res. 172—67th Congress, 1st Session, Report No. 279.

people. The port of New York, with its three entrances, 800 miles of water front, 12 railroads (exclusive of local transit lines) entering the port, a terminus for nearly all of the more important transatlantic lines, not only concerns the people of the two States, but constitutes an asset of the entire Nation. The necessity of creating the port district and authorizing the creation of the port authority is manifest from the fact that over 40 municipalities are involved, some of them controlled by men of divergent views and many of them working at cross-purposes and in the dark."

THE SUIT TO RESTRAIN THE SIGNING OF THE TREATY.

The City of New York brought suit in the Supreme Court of New York State for New York County to enjoin and restrain Commissioners Willcox, Outerbridge *et al.* from entering into the port treaty, but its application for an injunction was denied (*City of New York* v. *Willcox*, 115 Misc. 351).

STUDY PRECEDING THE COMPREHENSIVE PLAN.

The second source in which must be sought any power or duty of the Port Authority in the premises is the Comprehensive Plan adopted by the two States and by Congress to guide specifically the reorganization of the port district. The statute embodying the plan may be divided in three parts: Section 1, containing the general principles, in which, if in any part of the plan, is to be found the power and duty to deal with the bridge in question; Sections 2 to 5, dealing with specific changes, and the remaining sections dealing with general power and authority.

The term "Comprehensive Plan" was coined by the New York, New Jersey Port and Harbor Development Commis-

sion for the purpose of describing the "layout" or arrangement of railroad, water and highway facilities by which all parties interested—carriers, state agencies, municipalities, steamships, industrial bodies—could be governed and guided in the carrying forward of their respective plans. It was necessary that the plan should be sufficiently definite and certain to be reliable, and yet sufficiently flexible not to preclude its modification in the direction of improvement. The states were unwilling, as is shown by the reservation in Article VI, to vest broad powers in the Port Authority until such a Comprehensive Plan had been approved. The communities attended before committees of the legislatures of the respective states and argued that unless the plan took care of their respective needs it might destroy one community, though benefiting another. The Comprehensive Plan, therefore, was to be the backbone of the future development of the Port of New York.

It will be observed that when the Bi-State Commission made its compendious report in 1920, the Legislatures declined, as they had done in 1919, to adopt the comprehensive or physical plan without further study. By July 30, 1921, therefore, there existed the pledge of the two States to co-operate, an agency competent to co-operate as the "joint or common agency" of the two States, the district within which this co-operation was to be effective, and the pledge of the two States to agree upon a Comprehensive Plan. The legislative direction was that the commissioners of the Port Authority should "take up, study and consider the joint report of the New York-New Jersey Port and Harbor Development Commission." The legislation directed that the commissioners of the Port Authority should "hold public hearings thereon," "confer with the governing bodies of all of the municipalities within the port district and all dock, port, channel and improvement commissions, and any other bodies hav-

ing to do with port and harbor facilities, with the Secretary of War, with the appropriate committees of Congress, with the Interstate Commerce Commission, and any and all other Federal authorities having jurisdiction in the premises, and shall, for the purpose of securing advice and information, create an advisory council of representatives of chambers of commerce, boards of trade and other civic bodies within the port district whose charters include consideration of the matters embraced in the said joint report." The commissioners were further required to confer with railroad, steamship, warehouse and other officials. Based upon all of this further study, the commissioners were required to report to the Legislatures of both states prior to January 1, 1922, the results of their "study, investigation, hearings and conferences," and to submit a "Comprehensive Plan for the Development of the Port District," the result of such study, investigation, hearings and conferences, "together with their recommendations for such legislation as they deem appropriate for the effectuation and consummation of such plan."

During the year of 1921-2, after the authorization of the treaty and the creation of the Port Authority, the latter body proceeded to carry out the mandate of the two Legislatures. It made its report to the two Legislatures under date of December 21, 1921. This report shows that not only had the compact been executed, ratified and approved by Congress, but that the Advisory Council of trade and civic societies had been created, that the railway carriers, the shipping interests and all other parties interested had been consulted; and upon all of these the Port Authority recommended a "Comprehensive Plan." In its report (p. 11) the Port Authority said:

> It already is clear that certain fundamental conditions precedent can alone provide a proper solu-

tion of the problem and that any physical plans should comply with and be governed by those principles, so far as economically practicable.

These principles were later adopted *in haec verba* in the law as Section 1.

In explanation of these principles the Port Authority said "that only by a well-devised and comprehensive plan can such a great expanse of natural advantages be properly developed and co-ordinated so that all portions may have their free opportunity, and also that only by such means can there be avoided the mistakes of the past and be prevented the creation of new points of congestion that would occur again in the future by leaving the various districts unrelated."

It found that the plan must be one that would not alone assure prompt relief, but one that would "project larger plans for future development as far ahead as the process of reasoning could foresee, so that each part of the port in the development of its local projects and its growth might properly co-ordinate them with the whole."

Attached to its report, and indicating how the various local improvements would dovetail and fit in with the larger Comprehensive Plan, is an exhibit showing the "Port Newark Terminal showing Proposed Development Bureau of Docks," as well as improvements projected by other municipalities within the district.

The Comprehensive Plan.

The statutes embodying the plan are Chapter 43 of the Laws of New York, 1922, and Chapter 9 of the Laws of New Jersey, 1922. These will be found at page 69 *et seq.* of the Appendix and are in identical language in each State.

Each Act provides:

> "Now, therefore (the State of New York [or the State of New Jersey, as the case may be] by appropriate legislation concurring therein), the following be and it is hereby adopted as the Comprehensive Plan for the development of the Port of New York, under and pursuant to said compact or agreement."

The plan then follows.

Section 1 deals with the principles to govern the development. Because of the fact that they are the only general directions found in the plan as to the reorganization of the district, we quote them at length:

> First: That terminal operations within the Port District so far as practicable should be unified;
>
> Second: That there should be consolidation of shipments at proper classification points so as to eliminate duplication of effort, inefficient loading of equipment and realize reduction in expenses;
>
> Third: That there should be the most direct routing of all commodities so as to avoid centers of congestion, conflicting currents and long truck-hauls;
>
> Fourth: That terminal stations established under the Comprehensive Plan should be union stations so far as practicable;
>
> Fifth: That the process of co-ordinating facilities should so far as practicable adapt existing facilities as integral parts of the new system so as to avoid needless destruction of existing capital investment and reduce so far as may be possible the requirements for new capital; and endeavor should be made to obtain the consent of the States and local municipalities within the Port District for the co-ordination of their present and contemplated port and terminal facilities with the whole plan;

Sixth: That freight from all railroads must be brought to all parts of the port wherever practicable without cars breaking bulk, and this necessitates tunnel connection between New Jersey and Long Island, and tunnel or bridge connections between other parts of the port;

Seventh: That there should be urged upon the Federal authorities improvement of channels so as to give access for that type of waterborne commerce adapted to the various forms of development which the respective shorefronts and adjacent lands of the port would best lend themselves to;

Eighth: Highways for motor truck traffic should be laid out so as to permit the most efficient interrelation between terminals, piers and industrial establishments not equipped with railroad sidings and for the distribution of building materials and many other commodities which must be handled by trucks; these highways to connect with existing or projected bridges, tunnels and ferries;

Ninth: Definite methods for prompt relief must be devised that can be applied for the better co-ordination and operation of existing facilities while larger and more comprehensive plans for future development are being carried out.

Section 2 declares merely that the bridges, tunnels and belt lines forming part of the Comprehensive Plan "are generally and in outline indicated on maps filed by the Port of New York Authority in the offices of the secretaries of the States of New York and New Jersey." Copies of the map are submitted as part of this case.[13]

Section 3 names the tunnels and bridges which are to form part of the plan. (a) A tunnel or tunnels connecting the New Jersey shore and the Brooklyn shore. (b) A

[13] Inside back cover.

bridge and/or tunnel across the Arthur Kill. By subdivision (c) it is provided that "the location of all such tunnels or bridges to be at the shortest, most accessible and most economical points practicable, taking account of existing facilities now located within the port district and providing for and taking account of all reasonably foreseeable future growth in all parts of the district."

Section 4 deals with the connection of the Island of Manhattan with New Jersey by bridge or tunnel, or both.

Section 5 deals with fifteen belt lines, naming in each instance the existing railroad facilities which are to form a part thereof.

Section 6 provides as follows:

> "The determination of the exact location, system and character of each of the said tunnels, bridges, belt lines, approaches, classification yards, warehouses, terminals or other improvements shall be made by the Port Authority after public hearings and further study, but in general the location thereof shall be as indicated upon said map, and as herein described."

Section 7 contains the reservation that:

> "The right to add to, modify or change any part of the foregoing Comprehensive Plan is reserved by each State, with the concurrence of the other."

The adoption by the two Legislatures of the Comprehensive Plan fulfilled the condition contained in Article VI of the port treaty and thus made available the powers vested in the Port Authority by the treaty itself. From that moment the Port Authority could exercise any of the powers vested in it under the treaty. In order to make

more effective, however, the pledge which the two States had agreed upon, the legislative acts approving of the Comprehensive Plan added powers to the Port Authority. Section 8 provides:

> "The Port of New York Authority is hereby authorized and directed to proceed with the development of the Port of New York in accordance with said Comprehensive Plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either State to effectuate the same, except the power to levy taxes or assessments."

The Legislatures further said:

> "The Port Authority shall be regarded as the municipal corporate instrumentality of the two States for the purpose of developing the port and effectuating the pledge of the States in the said compact."

The treaty provided that it was the intention of the States to create "a joint or common agency." It was now defined as "the municipal corporate instrumentality of the two States." It was expressly provided that "it shall have no power to pledge the credit of either State or to impose any obligation upon either State, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given."

But to enable it to borrow the large sums of money which would be required, the States agreed—and their compact is a contract within the meaning of the Constitution (*Green* v. *Biddle*, 8 Wheat. 1, 5 L. Ed. 547)—that the bonds *or securities* issued by the Port Authority *shall at all times be free from taxation by either State.* The

States further provided that "all municipalities within the district are hereby authorized and empowered to co-operate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to co-operate." The Port Authority itself was to "render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and harbor improvements, so far as practicable, to fit in with said plan." It has "power to apply to all Federal agencies, including the Interstate Commerce Commission, the War Department and the United States Shipping Board, for suitable assistance in carrying out said plan." It was required to "co-operate with the State Highway Commissioners of each State so that trunk line highways as and when laid out by each State shall fit in with said Comprehensive Plan."

It was not only to "request the Congress of the United States to make * * * appropriations for deepening and widening channels," but to request the Congress "to make such grants of power as will enable the said plan to be effectuated." It did apply to the Congress, both for the appropriations for deepening and widening channels and for grant of power.

The Federal Approval and Grant of Power.

The grant of power is to be found in the resolution of Congress (Appendix, p. 81, Public Resolution No. 66, 67th Congress—H. J. Res. 337) granting both the "consent of Congress" and "authority to the Port of New York Authority to execute the Comprehensive Plan approved by the States of New York and New Jersey by Chapter 43, Laws of New York, 1922, and Chapter 9, Laws of New Jersey, 1922." The resolution recited that, pursuant to the agreement or compact entered into in 1921 the two

States had agreed upon a Comprehensive Plan for the development of the port, and that "the carrying out and executing of the said plan *will the better promote and facilitate commerce between the States, and between the States and foreign nations, and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation.*"

The details of the legislation are repeated *in haec verba.*

> "AND THE CONSENT OF CONGRESS IS HEREBY GIVEN TO THE CARRYING OUT AND EFFECTUATION OF SAID COMPREHENSIVE PLAN, AND THE SAID PORT OF NEW YORK AUTHORITY IS AUTHORIZED AND EMPOWERED TO CARRY OUT AND EFFECTUATE THE SAME."

The only reservations in the resolution are the following:

That the powers are

> "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution."

> "That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement."

> "That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters until the plans therefor have been approved by the Chief of Engineers and Secretary of War."

> "That the right to alter, amend, or repeal this resolution is hereby expressly reserved."

In the Progress Report of the Port Authority for 1923 to the Legislatures of the two States, in reporting the approval by Congress, it refers to the report of the Committee of the Judiciary in support thereof and states:

> "President Harding recognized the great importance of the matter, and though it reached him only on Saturday, July 1, 1922, when he was under great pressure of many important matters and bound by engagements to leave Washington for a visit to Gettysburg, nevertheless he gave it his immediate consideration and approved it that day."

In the same report the effect of the adoption of the Comprehensive Plan on Federal appropriations for harbor development within the Port District is reported in the following paragraph:

> "The effect of the adoption of the Comprehensive Plan upon the matter of deepening and widening channels and improving harbors is to be found in the recent report of the Chief of Engineers of the War Department and the proposed Rivers and Harbors Act. (Annexed hereto is a table showing appropriations in previous years and the appropriations proposed for this year.)[14] Congress, in the opinion of the Army Engineers, is justified in making appropriations now that there is a plan upon which to proceed.

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[14] This table showed that Congress proposed appropriations of $7,937,000 for improvements in the port district for the year 1923, the first following the adoption of the Comprehensive Plan. This compared with a maximum during eight of the preceding nine years of less than $3,000,000, the exception being the year 1919 when $7,718,600 was appropriated, $6,500,000 being devoted to a single project in the East River. Contrasted to this the proposed appropriations for 1923 were spread over twenty-five localities, a distribution not before approached during the ten-year period.

> "The recommendations of the Chief of Engineers of the amounts that should properly be expended in the next year for river and harbor improvement and maintenance totaled $56,090,410.
>
> "The amounts included in this for the Port of New York District totaled $7,937,000."

Thus Congress not only expressly ratified, but acted in reliance upon, the effectuation of the Comprehensive Plan by making appropriations for the water channels over which the Federal Government has jurisdiction, assuming that the powers vested in the Port Authority and in the municipal bodies to co-operate would, in due course, bring about the consummation of all the other portions of the Comprehensive Plan. *Congress, in authorizing the Comprehensive Plan, adopted the principles of the Plan and the belt lines as regulations of commerce and navigation binding upon the carriers, as well as all others.*

Subsequent Legislation.

Other statutes relating to the Port Authority have been adopted, notably Chapter 623, Laws of New York, 1924, printed in the appendix. It was felt that the powers vested in the Port Authority to hold hearings were insufficient for the accomplishment of the objects charged to its care in the Comprehensive Plan, and accordingly the State of New York further defined the powers already granted to it and provided adequate machinery and appropriate jurisdiction in the Supreme Court of the State for the effectuation of those powers. This act provides for the holding of hearings, defines the Port Authority's jurisdiction, provides for the power of subpoena, the making and execution of orders, and gives jurisdiction to the Supreme Court effectively to support the jurisdiction of the Port Authority.

There were also adopted by the legislatures of the two States in 1924 statutes in identical form, reference to which is made in the appendix, conferring upon the Port Authority the power to construct and operate bridges across the Arthur Kill, between Staten Island and New Jersey. The Port Authority may pay for the bridges out of its own bond issues and support the bridges and retire the bond issues out of tolls. It is given the power of condemnation and such supplementary powers as it needs. These acts seem to have no bearing on the present case and are therefore not given in detail.

Subsequent and Pending Proceedings.

Up to the present time the Port Authority has confined the exercise of the powers conferred upon it to further study of the various problems committed to its charge and to the accomplishment of steps in its plan and other services to the public within the district, through hearings held either by itself or concurrently with the Interstate Commerce Commission or by its representation of the port district before other public bodies.

Specifically, the first proceeding instituted by the Port Authority was a hearing held concurrently by the Port Authority and the Interstate Commerce Commission on their own motion to determine what steps should be taken in the establishment of Belt Line No. 13, as described in Section 5 of the Comprehensive Plan. During the course of the hearings a remedy was proposed by the carriers interested and their proposal was accepted for trial and the hearings suspended. Pursuant to the proposal, the carriers have invested some hundreds of thousands of dollars in the creation of new and the reorganization of old facilities, have reconstructed their rate system along Belt Line No. 13, and have instituted other reforms to carry out the

direction of the statute. A hearing conducted by the Port Authority alone on the use of the Hell Gate bridge owned by the New York Connecting Railroad and forming a part of Belt Line No. 1, described in Section 5 of the Comprehensive Plan, is still pending.

In addition to this the Port Authority has intervened in several other important proceedings before the Interstate Commerce Commission, some of which are still pending, and in the proceeding before the United States Shipping Board relating to the subject of ocean differentials.

It is unnecessary to describe in detail the studies in which the Port Authority is engaged, such as those relating to inland union terminals, consolidation of lighterage, and so on.

I.

There can be no doubt of the power of Congress to deal with the subject-matter of the Comprehensive Plan nor of the effect of its action when it has so dealt.

The power of Congress to legislate effectively as to every part of and every instrumentality used in interstate commerce and the paramount effect of its legislation are too well settled to require discussion. We content ourselves with the citation of authorities:

Houston E. & W. T. R. Co. v. *United States*, 234 U. S. 342; 58 L. Ed. 1341 at p. 1347.

Minnesota Rate Cases, 230 U. S. 352, at p. 399 (*Simpson* v. *Shepard*).

Northern Securities Co. v. *United States*, 193 U. S. 197, at p. 333.

Smith v. *Alabama,* 124 U. S. 465, 31 L. Ed. 508, at p. 510.

Addyston Pipe & Steel Co. v. *United States,* 175 U. S. 211, 44 L. Ed. 136, at p. 143.

In re Debs, 158 U. S. 564, 582.

California v. *Central Pacific R. Co.,* 127 U. S. 1, 32 L. Ed. 150, at p. 157.

Swift & Co. v. *United States,* 196 U. S. 375, 49 L. Ed. 518, at p. 525.

Luxton v. *North River Bridge Co.,* 153 U. S. 525, 38 L. Ed. 808, at p. 810.

Paul v. *Virginia,* 8 Wall. 168, 19 L. Ed. 357, at p. 361.

The Clinton Bridge, 1 Woolworth 150, October Term, 1867, Mr. Justice Miller, at p. 159.

II.

There can be no doubt of the right of Congress to make the Port Authority its agent to carry out its legislation.

While we do not suppose that the power of Congress to legislate on any phase of interstate commerce, to the exclusion of the States, can longer be questioned, the issue here presented, as we understand it, is what the intention of Congress was in the legislation which it did adopt; and, so far as the Port Authority is concerned, did the adoption of the Comprehensive Plan supersede the acts permitting the Central Railroad of New Jersey to construct the bridge in question?

Now, it is not to be doubted that Congress could select the Port Authority as its agent to do any act in relation to interstate commerce or its instrumentalities within the Port District which it chose.

Luxton v. *North River Bridge Co.*, 153 U. S. 525, 38 L. Ed. 808, at p. 810:

> "The Congress of the United States, being empowered by the Constitution to regulate commerce among the several states, and to pass all laws necessary or proper for carrying into execution any of the powers specifically conferred, may make use of any appropriate means for this end."

For which are cited:

McCulloch v. *Maryland*, 17 U. S. 4 Wheat. 316, 411, 422.

Osborn v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 861, 873.

Union Pac. R. Co. v. *Myers* ("Pacific R. Removal cases"), 115 U. S. 1, 18.

California v. *Central Pac. R. Co.*, 127 U. S. 1, 39.

Stockton v. *Baltimore & N. Y. R. Co.*, 32 Fed. Rep. 9, at pp. 14, 15:

> "At all events, if Congress, in the execution of its powers, chooses to employ the intervention of a proper corporation, whether of the State, or out of the State, we see no reason why it should not do so. There is nothing in the Constitution to prevent it from making contracts with or conferring powers upon State corporations for carrying out its own legitimate purposes."

III.

There can be no doubt that Congress has made the Port Authority its agent for the effectuation of the Comprehensive Plan.

(a) Words of power or authority in a statute must be construed as imperative and mandatory where such power or authority includes the performance of an act as to which the public is interested, or where the statute directs the doing of a thing for the sake of the public good.

The Circuit Court of Appeals (4th Cir.) in *State of Maryland* v. *Miller*, 194 Fed. 775, in approving a Maryland case, *Baltimore* v. *Marriott*, 9 Md. 160, said, at page 781:

> "There the provision was to the effect that the City of Baltimore should have 'full power and authority' to pass all laws and ordinances necessary to preserve the health of the city, and to prevent and remove nuisances, etc., and the Court held that when the statute conferred power upon the corporation, to be exercised for the public good, the exercise of the power was not merely discretionary, but imperative, and that the words 'power' and 'authority' meant duty and obligation."

The statute under consideration in that case gave to the Mayor and the Council of Baltimore "full power and authority" to provide for the preservation and navigation of certain rivers.

Under an Act of Congress of May 11, 1912, the Secretary of the Interior is "authorized to cause to be surveyed, if necessary, and appraised, in such manner as he may direct" certain unallotted Government lands. The Circuit Court of Appeals (8th Cir.) in *Chase* v. *United States*,

261 Fed. 833, where the construction of this Act of Congress was considered, held that a statute which "authorized" a public officer to do a certain thing imposes upon him a positive and absolute duty to do such act, which may be enforced by those for whose benefit it is to be done, in the absence of words giving him discretion. At page 837 of the opinion it is said:

> "An examination of the legislation of Congress shows that in many of the Acts of Congress the word 'authorized' is frequently used where a duty is imposed upon a public executive officer, and in no case are the duties imposed discretionary unless, after the word 'authorized' the other words, 'in his discretion,' are added. As was said by the Supreme Court of the United States in *Mason et al.* v. *Fearson,* 9 How. 258, 13 L. Ed. 125:
>
> "'Whenever it is provided that a corporation or officer "may" act in a certain way, or it "shall be lawful" for them to act in a certain way, it may be insisted on as a duty for them to act so, if the matter, as here, is devolved on a public officer and relates to the public or third persons. * * * Without going into more details, these cases fully sustain the doctrine that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do. The power is conferred for their benefit, not his; and the intent of the Legislature, which is the test in these cases, seems under such circumstances to have been "to impose a positive and absolute duty."' *Mayor of New York* v. *Furze,* 3 Hill (N. Y.) 612; *Minor et al.* v. *Mechanics' Bank of Alexandria,* 1 Pet. 46, 64, 7 L. Ed. 47, and note; *Livingston* v. *Tanner,* 14 N. Y. 64; *Ralston* v. *Crittenden* (C. C.), 13 Fed. 508; *Supervisors Rock Island County* v. *U. S.,* 4 Wall. 435, 18 L. Ed. 419."

In *Jones* v. *Madison County Commissioners,* 137 N. C. 579, 50 S. E. 291, it was said:

> "The terms of the first section of the act conferring power to issue bonds are 'authorize and empower' and in ordinary acceptation and in private transactions are usually permissive; but when these words are used in statutes they are frequently imperative, and where the statute is concerning public interests, or promotive of justice, or to secure and maintain the individual rights of others, such words are well-nigh uniformly construed to be mandatory. * * * Mr. Black in his Interpretation of Laws, p. 541, formulates the rule thus: 'Where a statute provides for the doing of some act which is required by justice or public duty, as where it invests a public body, municipality or officer, with power and authority to take some action which concerns the public interests or the rights of individuals, though the language of the statute be merely permissive in form, yet it will be construed as mandatory, and the execution of the power may be insisted upon as a duty.' * * *
>
> "He then cites several cases in which the term 'may' and 'authorized and empowered' and 'authorized' are respectively held to be imperative, and then proceeds: 'Even where the act provides that certain public officers, if deemed advisable, or if they believe the public good and the best interests of the city require it, may levy a certain tax, though these words are purely permissive in form, yet the act will be held to be peremptory whenever the public interests or individual rights call for the exercise of the power granted. And, in general, where the statute enacts that a public officer "may" act in a certain way, which is for the benefit of third persons, he *must* act in that way.'"

See, also:

Brokaw v. *Commissioners of Highways,* 130 Ill. 482, at p. 491.

People v. *Board of Supervisors,* 51 N. Y. 401, at pp. 405, 406.

Newburg Turnpike Co. v. *Miller,* 5 Johns. Ch. 101, at p. 113.

The statute considered in *Mayor, etc., of New York* v. *Furze,* 3 Hill 612, merely provided that "it shall be lawful" for certain specified officers to cause the construction of sewers. In approving and following the English authorities upon the subject the Court said, at pages 614-615:

> "This statute is one of public concern, relating exclusively to the public welfare; *and though permissive merely in its terms, it must be regarded, upon well-settled rules of construction, as imperative and peremptory upon the corporation.* When the public interest calls for the execution of the power thus conferred, the defendants are not at liberty arbitrarily to withhold it. The exercise of the power becomes then a duty which the corporations are bound to fulfill." [The Court then discusses certain old English cases.]
>
> "The inference deducible from the various cases on this subject seems to be that where a public body or officer has been clothed by statute with power to do an act which concerns the public interest or the rights of third persons, the execution of the power may be insisted on as a duty, though the phraseology of the statute be permissive merely and not peremptory."

The decisions of the United States Supreme Court are to the same effect. The statute involved in *Supervisors* v. *United States,* 4 Wall. 435, provided: "The board of supervisors * * * in such counties as may be owing debts

which their current revenue * * * is not sufficient to pay *may, if deemed advisable,* levy a special tax * * *" Mr. Justice Swayne, speaking for the Court, said, at pages 446, 447:

> *"The conclusion to be deduced from the authorities is, that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory.* What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless.
>
> In all such cases it is held that the intent of the Legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

Even the fact that a body has no power to enforce its orders cannot be successfully urged as a denial of the power to make the order. See *Turner Creamery Co.* v. *Chicago, M. & St. P. Ry. Co.,* 154 N. W. 819. See also *United States ex rel. Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178, where this Court directed the issuance of a writ of mandamus to compel the Interstate Commerce Commission to perform its duties under the provisions of the Valuation Act of March 1, 1913, though this would necessarily open a wide range of proof and call for "the exercise of close scrutiny and of scrupulous analysis in its consideration and application." In that case the Interstate Commerce Commission declined to receive and act upon evidence offered, upon the ground that it was impossible and difficult to accomplish the results intended by the statute.

(b) An appropriation to effectuate a work indicates an intent to have that work proceed.

In *Wisconsin* v. *Duluth,* 96 U. S. 379, the effect of an appropriation of ten thousand dollars to improve, protect and secure a canal was considered by the United States Supreme Court.

The canal improvement was laid out by Duluth and subsequently Congress appropriated $10,000 to improve, protect and secure the canal. *This action of Congress, i. e., making an appropriation, was held by the United States Supreme Court sufficient to indicate that Congress had taken charge of the situation,* and not even the United States Supreme Court could interfere.

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive charge and control of it; that they amount to the declaration of the Federal Government, that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control.
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> * * * * * *
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> "If, then, Congress, in the exercise of a lawful authority, has adopted and is carrying out a system of harbor improvements at Duluth, this Court can have no lawful authority to forbid the work. If that body sees fit to provide a way by which the great commerce of the lakes and the countries west of them, even to Asia, shall be securely accommodated at the harbor of Duluth by this short canal of three or four hundred feet, can this Court decree that it must forever pursue the old channel, by the

natural outlet, over water too shallow for large vessels, unsafe for small ones, and by a longer and much more tedious route?

"WHEN CONGRESS APPROPRIATES $10,000 TO IMPROVE, PROTECT AND SECURE THIS CANAL, THIS COURT CAN HAVE NO POWER TO REQUIRE IT TO BE FILLED UP AND OBSTRUCTED."

(c) In determining the meaning of the words employed, the intent of Congress is to be gathered from a consideration of the entire act and not solely from detached portions thereof. An act will never be held to destroy itself, but carries with it all power necessary to attain the end implied.

"* * * the general purpose of the act and the evils sought to be remedied must be always kept in mind, and, furthermore, parts of the act are not to be so construed as to defeat other important features of the same; nor is such a construction to be given to the act, in whole or in part, as may tend to prevent the proper enforcement of the legislative purpose." (Opinion of District Judge Shiras in *Van Patten* v. *Chicago, Milwaukee & St. Paul Ry. Co.,* 81 Fed. 545, at p. 547.)

"Whenever a power is given by statute, everything necessary to make it effectual or requisite to attain the end is implied. It is a well-established principle that statutes containing grants of power are to be construed so as to include the authority to do all things necessary to accomplish the object of the grant." (Lewis' Sutherland Statutory Construction, 2nd Ed. [1904], pp. 942, 943, 1 Kent Com. 464.)

"Where a statute creates a right, and provides generally for its enforcement, but neither creates nor designates a remedy, *the implication is that the Legislature intended that the right should be enforced by some existing and appropriate remedy."* (*Van Sickle* v. *Belknap,* 129 Indiana 558.)

Again:

> *"When a statute creates a new obligation, or makes unlawful that which was lawful before, a corresponding right is thereby impliedly given, either to the public or to the individual injured by the breach of the enactment; and sometimes to both."* (Endlich on the Interpretation of Statutes, Sec. 463, under "Statute Implies Means of Enforcement.")

In *Texas and Pacific Railway Company* v. *Abilene Cotton Oil Company,* 204 U. S. 426, 442, Chief Justice White held that every provision of the Interstate Commerce Act must be "read in connection with the context of the act" and that if "the general terms of the section, when taken alone, might sanction" a conclusion destructive of certain rights conferred in other parts of the act, the context must be considered and the general terms be so construed as to give full effect to the entire act.

IV.

The issues involved here.

The sole question involved in this case, so far as the Port Authority is concerned, is whether or not the general powers and duties granted to the Port Authority by the compact between the two States and by the Comprehensive Plan, all approved and adopted by Congress, apply to transportation facilities in the port district even when such facilities are not specifically mentioned. If the bridge in question had been specifically designated, as were the other two bridges crossing Newark Bay, there would be no question in our mind that the action of Congress in approving the Comprehensive Plan had, so far as inconsistent therewith, superseded the earlier statutes author-

izing the Central Railroad of New Jersey to rebuild the bridge. Not being so specified, the simple question remains, whether the general grants of power and duties laid upon the Port Authority by the compact and the plan did assure a reorganization of the port in harmony with the requirements of efficiency and economy, and particularly that the principles enumerated in Section 1 of the plan indicate an intention on the part of Congress and the States to make the approval of the Port Authority a condition precedent to changes in transportation facilities or to give the Port Authority a veto power over such changes if it shall believe them harmful.

The police powers of the State to regulate facilities of commerce and navigation and the constitutional power of Congress to control them, *all are now concentrated toward the accomplishment of a single plan by a single agency.*

There can be scarcely any doubt that Congress and the States intended that the Port Authority should be the guardian of the port, that it should safeguard the interests of all of the municipalities and of all the people residing in the port in so far as the improvement of their facilities and freight transportation were concerned. There can be no question that the Port Authority is the joint and common agency of the two States, for the purpose not alone of effectuating the Comprehensive Plan approved by the two States, but also of all supplementary plans thereto. It is significant that the Governors of the two States have recommended that the Port Authority undertake the financing and building of additional vehicular tunnels and bridges between the two States, and that the Legislatures have charged it with the construction of two bridges. Doubtless, in the years to come if this great agency justifies the hopes and expectations of the Legislatures and Congress and of the municipalities that have supported the project more and more will it come to be recognized as the

expert body competent to pass upon all matters relating to transportation service within the Port District. Its advice is sought by the engineers for the municipalities within the district and by the Federal agencies having to deal with transportation and shipping problems.

But as the District Court found that the commissioners of the Port Authority chance to be conservative men, not grasping for power, not interpreting the grants of power to extend their scope, but feeling rather modest in the assertion of their powers, it comes about that in this situation the Port Authority takes no position for or against the construction put upon the legislation by the City of Newark or the Central Railroad of New Jersey. Counsel for the Port Authority offers the foregoing historical recital and summary of the statutes as aids to the Court, and submits the following analysis of what seem to him to be the basic differences in principle:

Is the Comprehensive Plan limited to the bridges, tunnels and belt lines specifically named therein, or is its scope to be found in the nine principles stated in Section 1?

If the principles in Section 1 are to be applied, are they to be applied so as to embrace all terminal facilities within the Port District, whether specifically referred to in the legislation or not?

Are they to be so applied before the time when the Port Authority shall decide of its own initiative to take action thereon?

Is the question whether or not the proposed changes in the bridge come within the Comprehensive Plan a question of law or a question of fact?

Is the Port Authority the agency for determining such a question of fact, if it be a question of fact?

It seems to us that these questions can only be answered in the light of the general purpose of the legislation and with the objective of ultimately effectuating the entire plan.

Conclusion.

For these reasons we have deemed it to be our duty, even at considerable length, to lay before the Court the history and the legislative documents properly interpretative of the legislation here under review, and to do so in the spirit of a real *amicus curiae*. We are authorized to say again that if the Court should find that it is the Port Authority's duty to consider whether or not the remodeling of this bridge is or is not in conflict with the effectuation of the Comprehensive Plan it will gladly perform that duty.

Dated, New York, November 7, 1924.

Respectfully submitted,

JULIUS HENRY COHEN,
Counsel for The Port of New York Authority.

APPENDIX.

THE COMPACT BETWEEN THE STATES OF NEW YORK AND NEW JERSEY BY WHICH THE PORT OF NEW YORK DISTRICT AND THE PORT OF NEW YORK AUTHORITY, WITH CERTAIN POWERS, WERE CREATED.

ACTS OF THE CONGRESS OF THE UNITED STATES AND THE LEGISLATURES OF NEW YORK AND NEW JERSEY UNDER WHICH THE COMPACT WAS AUTHORIZED.

ACTS OF THE LEGISLATURES OF THE STATES OF NEW YORK AND NEW JERSEY AND OF CONGRESS APPROVING OF THE COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF THE PORT OF NEW YORK AND CONTAINING GRANTS OF POWER AND AUTHORITY TO THE PORT OF NEW YORK AUTHORITY TO EFFECTUATE THE COMPREHENSIVE PLAN.

ACT OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FURTHER EFFECTUATION OF THE COMPREHENSIVE PLAN, BY PROVIDING ADEQUATE MACHINERY AND APPROPRIATE JURISDICTION IN THE COURTS.

GENERAL DESCRIPTION OF OTHER PORT AUTHORITY LEGISLATION.

THE COMPACT BETWEEN THE STATES OF NEW YORK AND NEW JERSEY BY WHICH THE PORT OF NEW YORK DISTRICT AND THE PORT OF NEW YORK AUTHORITY, WITH CERTAIN POWERS, WERE CREATED.

WHEREAS, In the year eighteen hundred and thirty-four the states of New York and New Jersey did enter into an agreement fixing and determining the rights and obligations of the two states in and about the waters between the two states, especially in and about the bay of New York and the Hudson river; and

WHEREAS, Since that time the commerce of the port of New York has greatly developed and increased and the territory in and around the port has become commercially one center or district; and

WHEREAS, It is confidently believed that a better co-ordination of the terminal, transportation and other facilities of commerce in, about and through the port of New York will result in great economies, benefiting the nation, as well as the states of New York and New Jersey; and

WHEREAS, The future development of such terminal, transportation and other facilities of commerce will require the expenditure of large sums of money and the cordial co-operation of the states of New York and New Jersey in the encouragement of the investment of capital, and in the formulation and execution of the necessary physical plans; and

WHEREAS, Such result can best be accomplished through the co-operation of the two states by and through a joint or common agency;

Now, therefore, The said states of New Jersey and New York do supplement and amend the existing agreement of eighteen hundred and thirty-four in the following respects:

ARTICLE I.

They agree to and pledge, each to the other, faithful co-operation in the future planning and development of the port of New York, holding in high trust for the benefit of the nation the special blessings and natural advantages thereof.

ARTICLE II.

To that end the two states do agree that there shall be created and they do hereby create a district to be known as the "Port of New York District" (for brevity hereinafter referred to as "The District"), which shall embrace the territory bounded and described as follows:

The district is included within the boundary lines located by connecting points of known latitude and longitude. The approximate courses and distances of the lines enclosing the district are recited in the description, but the district is determined by drawing lines through the points of known latitude and longitude. Beginning at a point A of latitude forty-one degrees and four minutes north and longitude seventy-three degrees and fifty-six minutes west, said point being about sixty-five hundredths of a mile west of the westerly bank of the Hudson river and about two and one-tenth miles northwest of the pier at Piermont, in the county of Rockland, state of New

York; thence due south one and fifteen hundredths miles more or less to a point B of latitude forty-one degrees and three minutes north and longitude seventy-three degrees and fifty-six minutes west; said point being about one and three-tenths miles northwest of the pier at Piermont, in the county of Rockland, state of New York; thence south fifty-six degrees and thirty-four minutes west six and twenty-six hundredths miles more or less to a point C of latitude forty-one degrees and no minutes north and longitude seventy-four degrees and two minutes west, said point being about seven-tenths of a mile north of the railroad station at Westwood, in the county of Bergen, state of New Jersey; thence south sixty-eight degrees and twenty-four minutes west nine and thirty-seven hundredths miles more or less to a point D of latitude forty degrees and fifty-seven minutes north and longitude seventy-four degrees and twelve minutes west, said point being about three miles northwest of the business center of the city of Paterson, in the county of Passaic, state of New Jersey; thence south forty-seven degrees and seventeen minutes west eleven and eighty-seven hundredths miles more or less to a point E of latitude forty degrees and fifty minutes north and longitude seventy-four degrees and twenty-two minutes west, said point being about four and five-tenths miles west of the borough of Caldwell, in the county of Morris, state of New Jersey; thence due south nine and twenty hundredths miles more or less to a point F of latitude forty degrees and forty-two minutes north and longitude seventy-four degrees and twenty-two minutes west, said point being about one and two-tenths miles southwest of the passenger station of the Delaware, Lackawanna and Western railroad in the city of Summit, in the county of Union, state of New Jersey; thence south forty-two degrees and twenty-four minutes west, seven and seventy-eight hundredths miles more or less to a point

G of latitude forty degrees and thirty-seven minutes north and longitude seventy-four degrees and twenty-eight minutes west, said point being about two and two-tenths miles west of the business center of the city of Plainfield, in the county of Somerset, state of New Jersey; thence due south twelve and sixty-five hundredths miles more or less on a line passing about one mile west of the business center of the city of New Brunswick to a point H of latitude forty degrees and twenty-six minutes north and longitude seventy-four degrees and twenty-eight minutes west, said point being about four and five-tenths miles southwest of the city of New Brunswick, in the county of Middlesex, State of New Jersey; thence south seventy-seven degrees and forty-two minutes east ten and seventy-nine hundredths miles more or less to a point I of latitude forty degrees and twenty-four minutes north and longitude seventy-four degrees and sixteen minutes west, said point being about two miles southwest of the borough of Matawan, in the county of Middlesex, state of New Jersey; thence due east twenty-five and forty-eight hundredths miles more or less, crossing the county of Monmouth, state of New Jersey, and passing about one and four-tenths miles south of the pier of the Central Railroad of New Jersey at Atlantic Highlands to a point J of latitude forty degrees and twenty-four minutes north and longitude seventy-three degrees and forty-seven minutes west, said point being in the Atlantic ocean; thence north eleven degrees fifty-eight minutes east twenty-one and sixteen hundredths miles more or less to a point K, said point being about five miles east of the passenger station of the Long Island railroad at Jamaica and about one and three-tenths miles east of the boundary line of the city of New York, in the county of Nassau, state of New York; thence in a northeasterly direction passing about one-half mile west of New Hyde Park and about one and one-tenth miles

east of the shore of Manhasset bay at Port Washington, crossing Long Island Sound to a point L, said point being the point of intersection of the boundary line between the states of New York and Connecticut and the meridian of seventy-three degrees thirty-nine minutes and thirty seconds west longitude, said point being also about a mile northeast of the village of Port Chester; thence northwesterly along the boundary line between the states of New York and Connecticut to a point M, said point being the point of intersection between said boundary line between the states of New York and Connecticut and the parallel of forty-one degrees and four minutes north latitude, said point also being about four and five-tenths miles northeast of the business center of the city of White Plains; thence due west along said parallel of forty-one degrees and four minutes north latitude, the line passing about two and one-half miles north of the business center of the city of White Plains and crossing the Hudson river to the point A, the place of beginning.

The boundaries of said district may be changed from time to time by the action of the legislature of either state concurred in by the legislature of the other.

ARTICLE III.

There is hereby created "The Port of New York Authority" (for brevity hereinafter referred to as the "Port Authority"), which shall be a body corporate and politic, having the powers and jurisdiction hereinafter enumerated, and such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other, or by act or acts of congress, as hereinafter provided.

ARTICLE IV.

The port authority shall consist of six commissioners—three resident voters from the state of New York, two of whom shall be resident voters of the city of New York, and three resident voters from the state of New Jersey, two of whom shall be resident voters within the New Jersey portion of the district, the New York members to be chosen by the state of New York and the New Jersey members by the state of New Jersey in the manner and for the terms fixed and determined from time to time by the legislature of each state, respectively, except as herein provided.

Each commissioner may be removed or suspended from office as provided by the law of the state for which he shall be appointed.

ARTICLE V.

The commissioners shall, for the purpose of doing business, constitute a board and may adopt suitable by-laws for its management.

ARTICLE VI.

The port authority shall constitute a body, both corporate and politic, with full power and authority to purchase, construct, lease and/or operate any terminal or transportation facility within said district; and to make charges for the use thereof; and for any of such purposes to own, hold, lease and/or operate real or personal property, to borrow money and secure the same by bonds or by mortgages upon any property held or to be held by it. No property now or hereafter vested in or held by either

state, or by any county, city, borough, village, township or other municipality, shall be taken by the port authority without the authority or consent of such state, county, city, borough, village, township or other municipality, nor shall anything herein impair or invalidate in any way any bonded indebtedness of such state, county, city, borough, village, township or other municipality, nor impair the provisions of law regulating the payment into sinking funds of revenues derived from municipal property, or dedicating the revenues derived from any municipal property to a specific purpose.

The powers granted in this article shall not be exercised by the port authority until the legislatures of both states shall have approved of a comprehensive plan for the development of the port, as hereinafter provided.

ARTICLE VII.

The port authority shall have such additional powers and duties as may hereafter be delegated to or imposed upon it from time to time by the action of the legislature of either state concurred in by the legislature of the other. Unless and until otherwise provided, it shall make an annual report to the legislature of both states, setting forth in detail the operations and transactions conducted by it pursuant to this agreement and any legislation thereunder. The port authority shall not pledge the credit of either state except by and with the authority of the legislature thereof.

ARTICLE VIII.

Unless and until otherwise provided, all laws now or hereafter vesting jurisdiction or control in the public service commission, or the public utilities commission, or like

body, within each state respectively, shall apply to railroads and to any transportation, terminal or other facility owned, operated, leased or constructed by the port authority, with the same force and effect as if such railroad, or transportation, terminal or other facility were owned, leased, operated or constructed by a private corporation.

ARTICLE IX.

Nothing contained in this agreement shall impair the powers of any municipality to develop or improve port and terminal facilities.

ARTICLE X.

The legislatures of the two states, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive development of the port of New York.

ARTICLE XI.

The port authority shall from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.

ARTICLE XII.

The port authority may from time to time make recommendations to the legislatures of the two states or to the

congress of the United States, based upon study and analysis, for the better conduct of the commerce passing in and through the port of New York, the increase and improvement of transportation and terminal facilities therein, and the more economical and expeditious handling of such commerce.

ARTICLE XIII.

The port authority may petition any interstate commerce commission (or like body), public service commission, public utilities commission (or like body), or any other federal, municipal, state or local authority, administrative, judicial or legislative, having jurisdiction in the premises, after the adoption of the comprehensive plan as provided for in article X for the adoption and execution of any physical improvement, change in method, rate of transportation, system of handling freight, warehousing, docking, lightering or transfer of freight, which, in the opinion of the port authority, may be designed to improve or better the handling of commerce in and through said district, or improve terminal and transportation facilities therein. It may intervene in any proceeding affecting the commerce of the port.

ARTICLE XIV.

The port authority shall elect from its number a chairman, vice-chairman, and may appoint such officers and employees as it may require for the performance of its duties, and shall fix and determine their qualifications and duties.

ARTICLE XV.

Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislatures of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority and approved by the governors of the two states, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year.

ARTICLE XVI.

Unless and until otherwise determined by the action of the legislatures of the two states, no action of the port authority shall be binding unless taken at a meeting at which at least two members from each state are present and unless four votes are cast therefor, two from each state. Each state reserves the right hereafter to provide by law for the exercise of a veto power by the governor thereof over any action of any commissioner appointed therefrom.

ARTICLE XVII.

Unless and until otherwise determined by the action of the legislatures of the two states, the port authority shall not incur any obligations for salaries, office or other administrative expenses, within the provisions of article XV, prior to the making of appropriations adequate to meet the same.

ARTICLE XVIII.

The port authority is hereby authorized to make suitable rules and regulations not inconsistent with the constitution of the United States or of either state, and subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce, which, when concurred in or authorized by the legislatures of both states, shall be binding and effective upon all persons and corporations affected thereby.

ARTICLE XIX.

The two states shall provide penalties for violations of any order, rule or regulation of the port authority, and for the manner of enforcing the same.

ARTICLE XX.

The territorial or boundary lines established by the agreement of eighteen hundred and thirty-four, or the jurisdiction of the two states established thereby, shall not be changed except as herein specifically modified.

ARTICLE XXI.

Either state may by its legislature withdraw from this agreement in the event that a plan for the comprehensive development of the port shall not have been adopted by both states on or prior to July first, nineteen hundred and twenty-three; and when such withdrawal shall have been communicated to the governor of the other state by the state so withdrawing, this agreement shall be thereby abrogated.

ARTICLE XXII.

Definitions. The following words as herein used shall have the following meaning: "Transportation facility" shall include railroads, steam or electric, motor truck or other street or highway vehicles, tunnels, bridges, boats, ferries, car-floats, lighters, tugs, floating elevators, barges, scows or harbor craft of any kind, air craft suitable for harbor service, and every kind of transportation facility now in use or hereafter designed for use for the transportation or carriage of persons or property. "Terminal facility" shall include wharves, piers, slips, ferries, docks, dry docks, bulkheads, dock-walls, basins, car-floats, float-bridges, grain or other storage elevators, warehouses, cold storage, tracks, yards, sheds, switches, connections, overhead appliances, and every kind of terminal or storage facility now in use or hereafter designed for use for the handling, storage, loading or unloading of freight at steamship, railroad or freight terminals. "Railroads" shall include railways, extensions thereof, tunnels, subways, bridges, elevated structures, tracks, poles, wires, conduits, power houses, substations, lines for the transmission of power, car-barns, shops, yards, sidings, turnouts, switches, stations and approaches thereto, cars and motive equipment. "Facility" shall include all works, buildings, structures, appliances and appurtenances necessary and convenient for the proper construction, equipment, maintenance and operation of such facility or facilities or any one or more of them. "Real property" shall include land under water, as well as uplands, and all property either now commonly or legally defined as real property or which may hereafter be so defined. "Personal property" shall include choses in action and all other property now commonly or legally defined as personal property or which may hereafter be so defined. "To

lease" shall include to rent or to hire. "Rule or regulation," until and unless otherwise determined by the legislatures of both states, shall mean any rule or regulation not inconsistent with the constitution of the United States or of either state, and, subject to the exercise of the power of congress, for the improvement of the conduct of navigation and commerce within the district, and shall include charges, rates, rentals or tolls fixed or established by the port authority; and until otherwise determined as aforesaid, shall not include matters relating to harbor or river pollution. Wherever action by the legislature of either state is herein referred to, it shall mean an act of the legislature duly adopted in accordance with the provisions of the constitution of the state.

Plural or singular. The singular wherever used herein shall include the plural.

Consent, approval or recommendation of municipality; how given. Wherever herein the consent, approval or recommendation of a "municipality" is required, the word "municipality" shall be taken to include any city or incorporated village within the port district, and in addition in the state of New Jersey any borough, town, township or any municipality governed by an improvement commission within the district. Such consent, approval or recommendation whenever required in the case of the city of New York shall be deemed to have been given or made whenever the board of estimate and apportionment of said city or any body hereafter succeeding to its duties shall by majority vote pass a resolution expressing such consent, approval or recommendation; and in the case of any municipality now or hereafter governed by a commission, whenever the commission thereof shall by a majority vote pass such a resolution; and in all other cases whenever the body authorized to grant consent to the use of the streets or highways of such municipality shall by a majority vote pass such a resolution.

IN WITNESS WHEREOF, we have hereunto set our hands and seals under Chapter 154 of the Laws of 1921 of the State of New York and Chapter 151 of the Laws of 1921 of the State of New Jersey, this thirtieth day of April, 1921.

WILLIAM R. WILLCOX	(L. S.)
EUGENIUS H. OUTERBRIDGE	(L. S.)
CHARLES D. NEWTON	(L. S.)
J. SPENCER SMITH	(L. S.)
DEWITT VAN BUSKIRK	(L. S.)
FRANK R. FORD	(L. S.)
THOMAS F. MCCRAN	(L. S.)

IN THE PRESENCE OF:

NATHAN L. MILLER	CLARENCE E. CASE
WALTER E. EDGE	D. P. KINGSLEY
ALFRED E. SMITH	IRVING T. BUSH
CHARLES S. WHITMAN	ARTHUR N. PIERSON
WILLIAM M. CALDER	JULIUS HENRY COHEN
LEWIS H. POUNDS	

in whose presence Messrs. Willcox, Outerbridge, Smith, Van Buskirk, Ford and McCran signed in the Great Hall of the Chamber of Commerce in the City of New York on the thirtieth day of April, 1921. Attorney General Newton being at that time absent from the City, he signed on the sixth day of May, 1921, at the Chamber, in the presence of:

WILLIAM LEARY	CHAS. T. GWYNNE

ACTS OF THE CONGRESS OF THE UNITED STATES AND OF THE LEGISLATURES OF NEW YORK AND NEW JERSEY UNDER WHICH THE COMPACT BETWEEN THE STATES OF NEW YORK AND NEW JERSEY WAS AUTHORIZED AND THE PORT OF NEW YORK DISTRICT AND THE PORT OF NEW YORK AUTHORITY CREATED.

LAWS OF NEW YORK, 1921.

CHAP. 154.

AN ACT authorizing designated authorities in behalf of the state of New York to enter into an agreement or compact with designated authorities of the state of New Jersey for the creation of the "Port of New York District," the establishment of "The Port of New York Authority," and the defining of the powers and duties of such authority.

Became a law April 2, 1921, with the approval of the Governor. Passed by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. William R. Willcox, Eugenius H. Outerbridge and Murray Hulbert, or any two of them, commissioners heretofore appointed under chapter four hundred and twenty-six of the laws of nineteen hundred and seventeen of the state of New York, together with the attorney-general of the state of New York, are hereby authorized as commissioners upon the part of the state of New York to enter into, with the state of New Jersey, by and through the commissioners appointed or who may be appointed under or by virtue of a law of the legislature of the state

of New Jersey, an agreement or compact in the form following, that is to say:

[Here follows the text of the treaty as it appears herein from pages 50 to 62.]

§ 2. The said agreement or compact, when signed and sealed by the commissioners of each state as hereinbefore provided, and the attorney-general of the state of New York, and the attorney-general of the state of New Jersey if he be designated so to act by the state of New Jersey, shall become binding upon the state of New York, and shall be filed in the office of the secretary of state of the state of New York.

§ 3. If by death, resignation or otherwise, a vacancy occurs among those appointed hereunder by the state of New York, the governor is hereby authorized to fill the same.

§ 4. The said commissioners, together with the commissioners appointed from the state of New Jersey, shall have power to apply to the congress of the United States for its consent and approval of the agreement or compact signed by them; but in the absence of such consent of congress and until the same shall have been secured, the said agreement or compact shall be binding upon the state of New York in all respects permitted by law for the two states of New York and New Jersey without the consent of congress to co-operate, for the purposes enumerated in said agreement or compact, and in the manner provided therein.

§ 5. This act shall take effect immediately.

CHAP. 151.

AN ACT to authorize a commission to enter into a compact or agreement with the State of New York for the development of the port of New York.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. J. Spencer Smith, De Witt Van Buskirk and Frank R. Ford, or any two of them, commissioners heretofore appointed under chapter 130 of the Laws of 1917, of the State of New Jersey, together with the Attorney-General of the State of New Jersey, are hereby authorized as commissioners upon the part of the State of New Jersey to enter into, with the State of New York, by and through the commissioners appointed or who may be appointed under or by virtue of a law of the Legislature of the State of New York, an agreement or compact in the form following, that is to say:

[Here follows the text of the treaty as it appears herein from pages 50 to 62, except for the omission from Article II, in the clause relating to the "business center of the city of Paterson," of the word "being," an obvious typographical error.]

2. The said agreement or compact, when signed and sealed by the commissioners of each State as hereinbefore provided, and the Attorney-General of the State of New Jersey, and the Attorney-General of the State of New York, if he be designated so to act by the State of New York, shall become binding upon the State of New Jersey, and shall be filed in the office of the Secretary of State of the State of New Jersey.

3. If by death, resignation or otherwise, a vacancy occurs among those appointed hereunder by the State of New Jersey, the Governor is hereby authorized to fill the same.

4. The said commissioners, together with the commissioners appointed from the State of New York, shall have power to apply to the Congress of the United States for its consent and approval of the agreement or compact signed by them; but in the absence of such consent of Congress and until the same shall have been secured, the said agreement or compact shall be binding upon the State of New Jersey in all respects permitted by law for the two States of New York and New Jersey without the consent of Congress to co-operate, for the purposes enumerated in said agreement or compact, and in the manner provided therein.

5. This act shall take effect immediately.

Passed April 7, 1921.

Public Resolution No. 17—67th Congress
[S. J. Res. 88]

JOINT RESOLUTION

Granting consent of Congress to an agreement or compact entered into between the State of New York and the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York.

Whereas commissioners duly appointed on the part of the State of New York and commissioners duly appointed on the part of the State of New Jersey for the creation of the Port of New York District and the establishment of the Port of New York Authority for the comprehensive development of the port of New York, pursuant to chapter 154, Laws of New York, 1921, and chapter 151, Laws of New Jersey, 1921, have executed certain articles, which are contained in the following, namely:

[Here follows the text of the treaty as it appears herein at pages 50 to 62.]

And

Whereas the said agreement has been signed and sealed by the commissioners of each State, and has thereby become binding on the two States as provided in the aforesaid acts: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the said agreement, and to each and every part and article thereof: *Provided,* That nothing therein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved, August 23, 1921.

ACTS OF THE LEGISLATURES OF THE STATES OF NEW YORK AND NEW JERSEY AND OF CONGRESS APPROVING OF THE COMPREHENSIVE PLAN FOR THE DEVELOPMENT OF THE PORT OF NEW YORK AND CONTAINING GRANTS OF POWER AND AUTHORITY TO THE PORT OF NEW YORK AUTHORITY TO EFFECTUATE THE COMPREHENSIVE PLAN.

Laws of New York, 1922
Chapter 43

An Act by which the state of New York agrees with the state of New Jersey upon the comprehensive plan for the development of the port of New York, pursuant to the compact authorized by the two states and signed April thirtieth, nineteen hundred and twenty-one, and consented to and approved by congress and the president of the United States, August twenty-three, nineteen hundred and twenty-one, and authorizing and empowering the port of New York authority to effectuate the same, and making an appropriation therefor.

Became a law February 24, 1922, with the approval of the Governor. Passed, three-fifths being present.

Laws of New Jersey, 1922
Chapter 9

An Act by which the State of New Jersey agrees with the State of New York upon the Comprehensive Plan for the development of the Port of New York, pursuant to the compact authorized by the two States and signed April thirtieth, one thousand nine hundred and twenty-one, and consented to and approved by Congress and the President of the United States, August twenty-third, one thousand nine hundred and twenty-one, and authorizing and empowering The Port of New York Authority to effectuate the same, and making an appropriation therefor.

Be it enacted *by the Senate and General Assembly of the State of New Jersey:*

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Whereas, The states of New York and New Jersey on the thirtieth of April, nineteen hundred and twenty-one, pursuant to chapter one hundred and fifty-four of the laws of nineteen hundred and twenty-one of New York and chapter one hundred and fifty-one of the laws of nineteen hundred and twenty-one of New Jersey, did enter into a compact or agreement which pledged the two states to faithful cooperation in the future planning and development of the port of New York, and which, furthermore, created the port of New York district, as therein described, and the port of New York authority, a body politic and corporate, as an instrumentality or agency of the two states to effectuate such pledge of cooperation;

And whereas, The said compact or agreement provides in article ten thereof that the "legislatures of the two states, prior to the signing of this agreement, or thereafter as soon as may be

WHEREAS, The States of New York and New Jersey, on the thirtieth of April, one thousand nine hundred and twenty-one, pursuant to chapter 154 of the Laws of 1921 of New York and chapter 151 of the Laws of 1921 of New Jersey, did enter into a compact or agreement which pledged the two States to faithful co-operation in the future planning and development of the Port of New York, and which, furthermore, created the Port of New York District, as therein described, and The Port of New York Authority, a body politic and corporate, as an instrumentality or agency of the two States to effectuate such pledge of co-operation; and

WHEREAS, The said compact or agreement provides in article X thereof that the "Legislatures of the two States, prior to the signing of this agreement, or thereafter as soon as may be practicable, will adopt a plan or plans for the comprehensive

practicable, will adopt a plan or plans for the comprehensive development of the port of New York";

Now, therefore (the state of New Jersey by appropriate legislation concurring therein), the following be and it is hereby adopted as the comprehensive plan for the development of the port of New York under and pursuant to said compact or agreement:

development of the port of New York;"

Now, therefore (the State of New York by appropriate legislation concurring therein), the following be and it is hereby adopted as the Comprehensive Plan for the development of the Port of New York, under and pursuant to said compact or agreement:

Section 1. Principles to govern the development:

First. That terminal operations within the port district, so far as economically practicable, should be unified;

Second. That there should be consolidation of shipments at proper classification points so as to eliminate duplication of effort, inefficient loading of equipment and realize reduction in expenses;

Third. That there should be the most direct routing of all commodities so as to avoid centers of congestion, conflicting currents and long truck-hauls;

Fourth. That terminal stations established under the comprehensive plan should be union stations, so far as practicable;

Fifth. That the process of coordinating facilities should so far as practicable adapt existing facilities as integral parts of the new system, so as to avoid needless destruction of existing capital investment and reduce so far as may be possible the requirements for new capital; and endeavor should be made to obtain the consent of local

municipalities within the port district for the coordination of their present and contemplated port and terminal facilities with the whole plan.

Sixth. That freight from all railroads must be brought to all parts of the port wherever practicable without cars breaking bulk, and this necessitates tunnel connection between New Jersey and Long Island, and tunnel or bridge connections between other parts of the port;

Seventh. That there should be urged upon the federal authorities improvement of channels so as to give access for that type of waterborne commerce adapted to the various forms of development which the respective shorefronts and adjacent lands of the port would best lend themselves to;

Eighth. That highways for motor truck traffic should be laid out so as to permit the most efficient inter-relation between terminals, piers and industrial establishments not equipped with railroad sidings and for the distribution of building materials and many other commodities which must be handled by trucks; these highways to connect with existing or projected bridges, tunnels and ferries.

Ninth. That definite methods for prompt relief should be devised which can be applied for the better coordination and operation of existing facilities while larger and more comprehensive plans for future development are being carried out.

§ 2. The bridges, tunnels and belt lines forming the comprehensive plan are generally and in outline indicated on maps filed by the port of New York authority in the offices of the secretaries of the states of New York and New Jersey and are hereinafter described in outline.

§ 3. Tunnels and bridges to form part of the plan. (a) A tunnel or tunnels connecting the New Jersey shore and the Brooklyn shore of New York to provide through line connection between the transcontinental railroads now having their terminals in New Jersey with the Long Island railroad and the New York connecting railroad on Long Island and with the New York Central and Hudson River railroad and the New York, New Haven and Hartford railroad in the Bronx, and to provide continuous transportation of freight between the Queens, Brooklyn and Bronx sections of the port to and from all parts of the westerly section of the port, for all of the transcontinental railroads.

(b) A bridge and/or tunnel across or under the Arthur kill, and/or the existing bridge enlarged, to provide direct freight carriage between New Jersey and Staten Island.

(c) The location of all such tunnels or bridges to be at the shortest, most accessible and most economical points practicable, taking account of existing facilities now located within the port district and providing for and taking account of all reasonably foreseeable future growth in all parts of the district.

§ 4. Manhattan service. The island of Manhattan to be connected with New Jersey by bridge or tunnel, or both, and freight destined to and from Manhattan to be carried underground, so far as practicable, by such system, automatic electric as hereinafter described or otherwise, as will furnish the most expeditious, economical and practicable transportation of freight, especially meat, produce, milk and other commodities comprising the daily needs of the people. Suitable markets, union inland terminal stations and warehouses to be laid out at points most convenient to the homes and industries upon the

island; the said system to be connected with all the transcontinental railroads terminating in New Jersey and by appropriate connection with the New York Central and Hudson River railroad, the New York, New Haven and Hartford and the Long Island railroads.

§ 5. Belt lines. The numbers hereinafter used correspond with the numbers which have been placed on the map of the comprehensive plan to identify the various belt lines and marginal railroads.

Number 1. Middle belt line. Connects New Jersey and Staten Island and the railroads on the westerly side of the port with Brooklyn, Queens, the Bronx and the railroads on the easterly side of the port. Connects with the New York Central railroad in the Bronx; with the New York, New Haven and Hartford railroad in the Bronx; with the Long Island railroad in Queens and Brooklyn; with the Baltimore and Ohio railroad near Elizabethport and in Staten Island; with the Central Railroad Company of New Jersey at Elizabethport and at points in Newark and Jersey City; with the Pennsylvania railroad in Newark and Jersey City; with the Lehigh Valley railroad in Newark and Jersey City; with the Delaware, Lackawanna and Western railroad in Jersey City and the Secaucus meadows; with the Erie railroad in Jersey City and the Secaucus meadows; with the New York, Susquehanna and Western, the New York, Ontario and Western and the West Shore railroads on the westerly side of the Palisades above the Weehawken tunnel.

The route of the middle belt line as shown on said map is in general as follows: Commencing at the Hudson river at Spuyten Duyvil running easterly and southerly generally along the easterly side of the Harlem river, utilizing existing lines so far as practicable and improving and

adding where necessary, to a connection with Hell Gate bridge and the New Haven railroad, a distance of approximately seven miles; thence continuing in a general southerly direction, utilizing existing lines and improving and adding where necessary, to a point near Bay Ridge, a distance of approximately eighteen and one-half miles; thence by a new tunnel under New York bay in a northwesterly direction to a portal in Jersey City or Bayonne, a distance of approximately five miles, to a connection with the tracks of the Pennsylvania and Lehigh Valley railroads; thence in a generally northerly direction along the easterly side of Newark bay and the Hackensack river at the westerly foot of the Palisades, utilizing existing tracks and improving and adding where necessary, making connections with the Jersey Central, Pennsylvania, Lehigh Valley, Delaware, Lackawanna and Western, Erie, New York, Susquehanna and Western, New York, Ontario and Western, and West Shore railroads, a distance of approximately ten miles. From the westerly portal of the Bay tunnel and from the line along the easterly side of Newark bay by the bridges of the Central railroad of New Jersey (crossing the Hackensack and Passaic rivers) and of the Pennsylvania and Lehigh Valley railroads (crossing Newark bay) to the line of the Central railroad of New Jersey running along the westerly side of Newark bay and thence southerly along this line to a connection with the Baltimore and Ohio railroad south of Elizabethport, utilizing existing lines so far as practicable and improving and adding where necessary, a distance of approximately twelve miles; thence in an easterly direction crossing the Arthur kill, utilizing existing lines so far as practicable and improving and adding where necessary, along the northerly and easterly shores of Staten Island to the new city piers and to a connection, if the city of New York consent thereto, with the tunnel under the Narrows

to Brooklyn provided for under chapter seven hundred of the laws of the state of New York for nineteen hundred and twenty-one.

Number 2. A marginal railroad to the Bronx extending along the shore of the East river and Westchester creek connecting with the middle belt line (number one), and with the New York, New Haven and Hartford railroad in the vicinity of Westchester.

Number 3. A marginal railroad in Queens and Brooklyn extending along Flushing creek, Flushing bay, the East river and the upper New York bay. Connects with the middle belt line (number one), by lines number four, number five, number six and directly at the southerly end at Bay Ridge. Existing lines to be utilized and improved and added to and new lines built where lines do not now exist.

Number 4. An existing line to be improved and added to where necessary. Connects the middle belt line (number one), with the marginal railroad number three near its northeasterly end.

Number 5. An existing line to be improved and added to where necessary. Connects the middle belt line (number one), with the marginal railroad number three in Long Island City.

Number 6. Connects the middle belt line (number one), with the marginal railroad number three in the Greenpoint section of Brooklyn. The existing portion to be improved and added to where necessary.

Number 7. A marginal railroad surrounding the northerly and westerly shores of Jamaica bay. A new line. Connects with the middle belt line (number one).

Number 8. An existing line, to be improved and added to where necessary. Extends along the southeasterly shore of Staten Island. Connects with middle belt line (number one).

Number 9. A marginal railroad extending along the westerly shore of Staten Island and a branch connection with number eight. Connects with the middle belt line (number one), and with a branch from the outer belt line (number fifteen).

Number 10. A line made up mainly of existing lines, to be improved and added to where necessary. Connects with the middle belt line (number one) by way of marginal railroad number eleven. Extends along the southerly shore of Raritan bay and through the territory south of the Raritan river reaching New Brunswick.

Number 11. A marginal railroad extending from a connection with the proposed outer belt line (number fifteen) near New Brunswick along the northerly shore of the Raritan river to Perth Amboy, thence northerly along the westerly side of the Arthur kill to a connection with the middle belt line (number one) south of Elizabethport. The portion of this line which exists to be improved and added to where necessary.

Number 12. A marginal railroad extending along the easterly shore of Newark bay and the Hackensack river and connects with the middle belt line (number one). A new line.

Number 13. A marginal railroad extending along the westerly side of the Hudson river and the Upper New York bay. Made up mainly of existing lines—the Erie Terminals, Jersey Junction, Hoboken Shore, and National Docks railroads. To be improved and added to where

necessary. To be connected with middle belt line (number one).

Number 14. A marginal railroad connecting with the middle belt line (number one), and extending through the Hackensack and Secaucus meadows.

Number 15. An outer belt line, extending around the westerly limits of the port district beyond the congested section. Northerly terminus on the Hudson river at Piermont. Connects by marginal railroads at the southerly end with the harbor waters below the congested section. By spurs connects with the middle belt line (number one) on the westerly shore of Newark bay and with the marginal railroad on the westerly shore of Staten Island (number nine).

Number 16. The automatic electric system for serving Manhattan Island. Its yards to connect with the middle belt line and with all the railroads of the port district. A standard gauge underground railroad deep enough in Manhattan to permit of two levels of rapid transit subways to pass over it. Standard railroad cars to be brought through to Manhattan terminals for perishables and food products in refrigerator cars. Cars with merchandise freight to be stopped at its yards. Freight from standard cars to be transferred onto wheeled containers, thence to special electrically propelled cars which will bear it to Manhattan. Freight to be kept on wheels between the door of the standard freight car at the transfer point and the tail board of the truck at the Manhattan terminal or the store door as may be elected by the shipper or consignee, eliminating extra handling.

Union terminal stations to be located on Manhattan in zones as far as practicable of equal trucking* distance, as

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* New Jersey statute reads "tracking," obviously a typographical error.

to pickups and deliveries, to be served by this system. Terminals to contain storage space and space for other facilities. The system to bring all the railroads of the port to Manhattan.

§ 6. The determination of the exact location, system and character of each of the said tunnels, bridges, belt lines, approaches, classification yards, warehouses, terminals or other improvements shall be made by the port authority after public hearings and further study, but in general the location thereof shall be as indicated upon said map, and as herein described.

§ 7. The right to add to, modify or change any part of the foregoing comprehensive plan is reserved by each state, with the concurrence of the other.

§ 8. The port of New York authority is hereby authorized and directed to proceed with the development of the port of New York in accordance with said comprehensive plan as rapidly as may be economically practicable and is hereby vested with all necessary and appropriate powers not inconsistent with the constitution of the United States or of either state, to effectuate the same, except the power to levy taxes or assessments. It shall request the congress of the United States to make such appropriations for deepening and widening channels and to make such grants of power as will enable the said plan to be effectuated. It shall have power to apply to all federal agencies, including the interstate commerce commission, the war department, and the United States shipping board, for suitable assistance in carrying out said plan. It shall cooperate with the state highway commissioners of each state so that trunk line highways as and when laid out by each state shall fit in with said comprehensive plan. It shall render such advice, suggestion and assistance to all municipal officials as will permit all local and municipal port and

harbor improvements, so far as practicable, to fit in with said plan. All municipalities within the district are hereby authorized and empowered to cooperate in the effectuation of said plan, and are hereby vested with such powers as may be appropriate or necessary so to cooperate. The bonds or other securities issued by the port authority shall at all times be free from taxation by either state. The port authority shall be regarded as the municipal corporate instrumentality of the two states for the purpose of developing the port and effectuating the pledge of the states in the said compact, but it shall have no power to pledge the credit of either state or to impose any obligation upon either state, or upon any municipality, except as and when such power is expressly granted by statute, or the consent by any such municipality is given.

§ 9. The sum of one hundred thousand dollars ($100,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the state treasury not otherwise appropriated, for the expenses of the port authority. The moneys hereby appropriated shall be paid out by the state treasurer on the warrant of the comptroller upon vouchers audited by the chairman of the port authority.

§ 10. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect immediately.

9. The sum of one hundred thousand dollars ($100,000), or so much thereof as may be necessary, is hereby appropriated out of any moneys in the State treasury not otherwise appropriated, for the expenses of the Port Authority. The moneys hereby appropriated shall be paid out by the State Treasurer on the warrant of the Comptroller of the Treasury, upon vouchers signed by the chairman of the said Port Authority.

10. All acts and parts of acts inconsistent herewith are hereby repealed, and this act shall take effect immediately.

Approved February 23, 1922.

Public Resolution No. 66—67th Congress
[H. J. Res. 337]

JOINT RESOLUTION

Granting consent of Congress and authority to the Port of New York Authority to execute the comprehensive plan approved by the States of New York and New Jersey by chapter 43, Laws of New York, 1922, and chapter 9, Laws of New Jersey, 1922.

Whereas pursuant to the agreement or compact entered into by the States of New York and New Jersey under date of April 30, 1921, and consented to by the Congress of the United States by resolution signed by the President on the 23rd day of August, 1921, the two States have agreed upon a comprehensive plan for the development of the port of New York; and

Whereas the carrying out and executing of the said plan will the better promote and facilitate commerce between the States and between the States and foreign nations and provide better and cheaper transportation of property and aid in providing better postal, military, and other services of value to the Nation: Therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over the matters, or any part thereof, covered by this resolution, the consent of Congress is hereby given to the supplemental agreement between the States of New York and New Jersey evidenced by chapter 43, Laws of New York, 1922, and chapter 9, Laws of New Jersey,

1922, covering the comprehensive plan for the development of the port of New York embraced in said statutes in form following, that is to say:

> [Here follows the text of the State statutes, Sections 1 to 7, inclusive, as it appears herein from page 71 to page 79, except for an obvious typographical error in using the words "adopt casting facilities" instead of "adapt existing facilities" in Section 1, fifth principle, second line. Note that the preambles and Sections 8, 9 and 10 of the State statutes are omitted.]

And the consent of Congress is hereby given to the carrying out and effectuation of said comprehensive plan, and the said Port of New York Authority is authorized and empowered to carry out and effectuate the same; *Provided*, That nothing herein contained shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement; *Provided further*, That no bridges, tunnels, or other structures shall be built across, under, or in any of the waters of the United States, and no change shall be made in the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War.

SEC. 2. That the right to alter, amend, or repeal this resolution is hereby expressly reserved.

Approved, July 1, 1922.

ACT OF THE LEGISLATURE OF THE STATE OF NEW YORK IN FURTHER EFFECTUATION OF THE COMPREHENSIVE PLAN, BY PROVIDING ADEQUATE MACHINERY AND APPROPRIATE JURISDICTION IN THE COURTS.

LAWS OF NEW YORK, 1924

CHAPTER 623

AN ACT to amend chapter forty-three of the laws of nineteen hundred and twenty-two, entitled "An Act by which the state of New York agrees with the state of New Jersey upon the comprehensive plan for the development of the port of New York, pursuant to the compact authorized by the two states and signed April thirtieth, nineteen hundred and twenty-one, and consented to and approved by congress and the president of the United States August twenty-three, nineteen hundred and twenty-one, and authorizing and empowering the port of New York authority to effectuate the same," in further effectuation of the powers given to the port of New York authority by said comprehensive plan and by the said compact, and providing adequate machinery and appropriate jurisdiction in the supreme court of this state.

Became a law May 5, 1924, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter forty-three of the laws of nineteen hundred and twenty-two is hereby amended by adding thereto the following sections:

§ 11. To facilitate the determination of the economic practicability of any step in the said comprehensive plan, or of any other fact or matter which the port authority is authorized and empowered to decide or determine, the port authority may conduct investigations, inquiries or hearings at such place or places and at such times as it shall appoint. Such investigations, inquiries or hearings may be held by or before one or more of the commissioners of the port authority, or by or before any person or persons appointed as its representative, and when ratified, approved or confirmed by the port authority on its action shall be and be deemed to be the investigation, inquiry or hearing of the port authority.

For the purpose of such investigations, inquiries or hearings, and of such other action or powers as the port authority may be authorized or empowered to take or exercise, it shall have jurisdiction of any and all persons, associations, or corporations, residing in, or acting or existing under or by virtue of the laws of, or owning property or coming within this state.

§ 12. The port authority shall have the power to compel the attendance of witnesses and the production of any papers, books or other documents, and to administer oaths to all witnesses who may be called before it. Subpoenas issued by the port authority shall be signed by a commissioner or by the secretary of the port authority and may be served by any person of full age. The fees of witnesses required to attend before the port authority shall be one dollar for each day's attendance, and three cents for every mile of travel by the nearest generally traveled routes in going to and from the place where the attendance of the witness is required. Such fees shall be paid when the witness is excused from further attendance, and the disbursements made in the payment of such fees shall be audited and paid in the same manner provided for the

payment of expenses of the port authority; provided that no witness subpoenaed at the instance of parties other than the port authority shall be entitled to compensation therefrom for attendance or travel, but the cost thereof shall be borne by the party at whose instance the witness is summoned, unless the port authority otherwise orders.

If a person subpoenaed to attend before the port authority fails to obey the command of such subpoena without reasonable cause, or if a person in attendance before the port authority shall, without reasonable cause, refuse to be sworn or be examined, or to answer a question, or to produce a book or paper, or other document, or to subscribe and swear to his deposition after it has been correctly reduced to writing, when directed so to do by the port authority or on its behalf, then the port authority may apply to the supreme court, or to any justice thereof, who shall have the power of the court for that purpose, upon proof by affidavit of the facts, for an order returnable in not less than two or more than five days after service thereof, directing such person to show cause before the court or justice who made the order, or any other justice, why he should not comply with the subpoena or direction of the port authority, or be committed to jail. Upon the return of such order, the court or justice before whom the matter shall come on for hearing shall examine under oath the person whose testimony may be relevant, and such person shall be given an opportunity to be heard, and if the justice shall determine that such person refused without reasonable cause or legal excuse to be examined, or to answer a legal and pertinent question, or to produce a book or paper which he was ordered to bring, he may order the said person to comply forthwith with the subpoena or direction of the port authority, or may commit the offender to jail, there to remain until he submits to do the act which he was so required to do, or is discharged according to law.

§ 13. All hearings before the port authority, including the taking of testimony, shall be governed by rules to be adopted and prescribed by it. No person shall be excused from testifying or from producing any books or papers in any investigation, inquiry or hearing before the port authority when ordered so to do by it, upon the ground that the testimony or evidence, books or documents, required of him may tend to incriminate him or subject him to penalty of forfeiture; but no person shall be prosecuted, punished or subjected to any penalty or forfeiture, for, or on account of, any act, transaction, matter or thing, concerning which he shall, under oath, have testified or produced documentary evidence, provided, however, that no person so testifying shall be exempt from prosecution or punishment for any perjury committed by him in his testimony. Nothing herein contained is intended to give, or shall be construed as in any manner giving, unto any corporation immunity of any kind.

No commissioner or employee of the port authority shall be required to give testimony in any civil suit to which the port authority is not a party with regard to information obtained by him in the discharge of his official duty.

§ 14. Every order of the port authority shall be served upon every person, association or corporation to be affected thereby, either by personal delivery of a certified copy thereof, or by mailing a certified copy thereof, in a sealed package with postage prepaid, to the person to be affected thereby; or in the case of a corporation to any officer or agent thereof upon whom a summons might be served, either within or without the state, in accordance with law. It shall be the duty of every person, association or corporation, to notify the port authority forthwith, in writing, of the receipt of the certified copy of every order so served, and in the case of a corporation such notifica-

tion must be signed and acknowledged by a person or officer duly authorized by the corporation to admit such service. Within a time specified in the order of the port authority, such person, association or corporation, upon whom it is served, must, if so required in the order, notify the port authority in like manner, whether the terms of the order are accepted and will be obeyed. Every order of the port authority shall take effect at a time therein specified and shall continue in force either for a period which may be designated therein, or until changed or abrogated by the port authority, unless such order be unauthorized by law, or be in violation of a provision of the constitution of the state, or of the United States.

No order staying or suspending an order of the port authority shall be made by any court otherwise than upon notice and after hearing, and if the order of the port authority is suspended, the order suspending the same shall contain a specific finding based upon evidence submitted to the court and identified by reference thereto that great and irreparable damage would otherwise result to the petitioner and specifying the nature of the damage.

§ 15. Whenever the port authority shall be of the opinion that any person, association or corporation subject to its jurisdiction is failing or omitting, or about to fail or omit to do anything required of it by the laws governing the development and regulation of the port of New York, or by its order, or is doing or is about to do anything, or permitting, or about to permit anything to be done contrary to, or in violation of, such law or orders, it shall direct its legal representative to commence an action or proceeding in the name of the port authority, in an appropriate court having jurisdiction, for the purpose of having such violations, or threatened violations, stopped and prevented either by mandamus or injunction. Such

an action or proceeding may be brought in the supreme court of this state, and the said court shall have and is hereby given the necessary and appropriate jurisdiction to grant mandamus or injunction, as the case may require, or any other relief appropriate to the case.

Failure of such person, association or corporation to notify the port authority, as required in the preceding section, of its acceptance of and willingness to obey any order of the port authority shall be and be deemed to be prima facie proof that such person, association or corporation is guilty of such violation, or threatened violation. The legal representative of the port authority shall begin such action or proceeding by a petition to the appropriate court, alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. If the petition is directed to a court of this state, it shall thereupon be the duty of the court to specify the time, not exceeding twenty days after the service of a copy of the petition, within which the person, association or corporation complained of must answer the petition. In case of default in answer, or after answer, the court shall immediately inquire into the facts and circumstances, in such manner as the court shall direct, without other or formal pleadings and without respect to any technical requirement. Such other persons, associations or corporations as the court shall deem necessary or proper to join as parties, in order to make its order, judgment or writs effective, may be joined as parties upon application of the legal representative of the port authority. The final judgment in any such action or proceeding shall either dismiss the action or proceeding, or direct that a writ of mandamus, or an injunction, or both, issue as prayed for in the petition, or in such modified or other form as the court may determine will afford the appropriate relief.

§ 16. Whenever the port authority, after opportunity to the parties affected or to be affected thereby to be heard, shall determine any fact or matter which it is authorized by any law to hear or determine, or that any step in the effectuation of the comprehensive plan is or in the near future will be economically practicable, it shall make its findings in writing, setting forth its reasons therefor, and such findings shall be and be deemed to be a determination by the port authority, under and pursuant to law. Upon such determination an appropriate order may be entered by the port authority and be made effective and may be enforced as herein provided.

If such findings or determination shall require the use of existing facilities or any part thereof described in the law, owned or operated by any carrier or carriers, then the port authority may order and require the carrier or carriers owning or operating said railroad facilities or part thereof to permit the use of such facilities or part thereof upon the payment of reasonable compensation therefor. If the carrier or carriers affected or to be affected by such order shall not be able, within the time to be specified in its order by the port authority, to agree among themselves upon the compensation to be paid by a user to a proprietor or operator for the use of such existing facilities or part thereof, then the port authority shall make determination of the amount to be paid by the user to the proprietary carrier or carriers, taking all the facts and circumstances into account, including the public use to which such facilities have been put; or, at its option, the port authority may apply to the supreme court of this state, either in a separate proceeding or in proceedings by mandamus or injunction to enforce its order, to fix and determine the fair and reasonable compensation to be paid by the user to the proprietary carrier or carriers for such use. If any carrier shall be dissatisfied with the

findings of the port authority in the matter of the compensation to be paid for the use of any existing facility, it shall have the right to review the same in the supreme court of this state by taking appropriate proceedings for such review within sixty days from the service of the order of the port authority, but pending such review the order for the use of such facilities shall be operative, the determination of the compensation by the court to relate back to the time of the commencement of such user, unless the court shall for good and proper reasons enjoin the operation of such order.

If, in the determination of steps to effectuate the comprehensive plan, the port authority shall determine that one or more union terminal stations are then, or in the near future, economically practicable, it shall call a conference of all the carriers affected or to be affected by the use of such terminal stations or station and shall submit to them a plan or plans for the construction, maintenance and use thereof. If the carriers or any of them shall fail or refuse to agree upon such plan, the port authority shall make and certify its findings and conclusions to the supreme court of this state, and the said court is vested with appropriate and adequate jurisdiction to determine whether or not such plan or plans for a union station or stations effectuate the comprehensive plan, and to make such conditions and impose such terms as will carry out the same in accordance with the principles embraced in the comprehensive plan and the laws governing the same.

§ 17. All actions and proceedings to which the port authority may be a party and in which any question arises under the laws relating to the port authority, or under or concerning any of its orders or actions, shall be preferred over all other civil causes, except election causes, in all courts of this state and shall be heard and deter-

mined in preference to all other civil business pending therein, except election causes, irrespective of position on the calendar. The same preference shall be granted upon application of the legal representative of the port authority, in any action or proceeding in which he may be allowed to intervene.

§ 2. The powers herein granted to the port authority shall be regarded as in aid of and supplemental to, and in no case as a limitation upon any of the powers vested in it by the states of New York and New Jersey and or by congress.

§ 3. If any term or provision of this act shall be declared unconstitutional or ineffective in whole or in part by a court of competent jurisdiction, then to the extent that it is not unconstitutional or ineffective such term or provision shall be enforced and effectuated; nor shall such determination be deemed to invalidate the remaining terms or provisions hereof.

§ 4. This act shall take effect immediately.

GENERAL DESCRIPTION OF OTHER PORT AUTHORITY LEGISLATION.

In addition to the statutes printed above for the convenience of the Court, the States of New York and New Jersey have adopted additional legislation relating to the Port Authority, which is not reprinted here, however, because we believe that it throws no light upon the general powers of the Port Authority or the general principles upon which the two States have acted in dealing with it.

Laws of New York, 1921, Chapter 203, and Laws of New Jersey, 1921, Chapter 152.

By these statutes the two States authorized the appointment of commissioners to the Port Authority, provided for the appointment of future commissioners, directed that they receive all the property and records acquired by the Bi-State Commission during its existence, and further directed them to study the report of the Bi-State Commission and to hold further public hearings and conferences with public and private bodies, including Federal agencies, create advisory councils of the representatives of commercial and transportation bodies, and generally to study further the recommendations of the Bi-State Commission and report the results of such study and submit a Comprehensive Plan for the development of the port district to the Legislatures in 1922. The sum of $100,000 was appropriated by each State for their expenses under these statutes.

LAWS OF NEW YORK, 1924, CHAPTERS 230 AND 186, AND LAWS OF NEW JERSEY, 1924, CHAPTERS 125 AND 149.

By these statutes the two States authorized and empowered the Port Authority to construct two bridges across the Arthur Kill, the first between Perth Amboy, New Jersey, and Tottenville, New York, and the second between Elizabeth, New Jersey, and Howland Hook, New York. The grants are recited to be in partial effectuation of the Comprehensive Plan and of the compact. The bridges are to be built and paid for out of money raised by the Port Authority upon bond issues or by similar means, secured by the revenues from the bridges. The Port Authority is authorized to make such regulations and establish such tolls as it finds necessary to comply with the terms of the bond issues and to maintain the bridges. Machinery for the exercise of the power of condemnation by the Port Authority in connection with the construction of the bridges is granted by Sections 5 to 14 of the respective acts. The rights of municipalities are protected as they are in the compact and the Comprehensive Plan. Appropriations of $50,000 from each State for each bridge are made for the expenses of preliminary surveys and studies.

State, or whether the legislation of Congress supersedes the laws of the State, respecting navigable waters wholly within New Jersey. P. 384.

3. The replacement in question was not within Ls. N. J. 1914, § 4, c. 123, as amended; requiring approval by the state Board of Commerce and Navigation of plans for water front development undertaken since the passage of that act. P. 385.
4. Nor, was approval necessary by the Port of New York Authority, a body corporate and politic created by compact between New Jersey and New York with the consent of Congress. P. 386.
5. The fact that the railroad's bridge was not included in the comprehensive plan for the development of the Port of New York (embracing Newark Bay) adopted pursuant to the said compact, does not make it unlawful or deprive the company of power to construct it. *Id.*

297 Fed. 77; 287 *id.*, 196, affirmed.

APPEAL from a decree of the Circuit Court of Appeals affirming a decree of the District Court which dismissed a bill brought by the City of Newark to enjoin the Railroad Company from constructing a bridge over Newark Bay. Jersey City and the State of New Jersey intervened as complainants. The Port of New York Authority, a body politic established by compact for the development of the Port of New York District, including Newark Bay, was made a defendant and answered, leaving its duties in the matter to the decision of the court. The bill was dismissed on motion of the Railroad, upon the ground that it did not state a cause of action. The two cities and the State appealed.

Mr. George W. Wickersham, with whom *Messrs. Jerome T. Congleton,* Corporation Counsel of the City of Newark; *Edward L. Katzenbach,* Attorney General of the State of New Jersey; *Thomas J. Brogan,* Corporation Counsel of the City of Jersey City, and *Paxton Blair,* were on the briefs, for appellants.

Mr. Richard V. Lindabury, with whom *Mr. Charles E. Miller* was on the brief, for the Central Railroad Company of New Jersey.

Mr. Julius Henry Cohen, for the Port of New York Authority.

MR. JUSTICE BUTLER delivered the opinion of the Court.

This suit was brought by the City of Newark to enjoin the construction of a bridge across Newark Bay. Jersey City and the State of New Jersey by leave of court intervened as parties complainant.

Under the authority of c. 64, Laws of New Jersey, 1860, the defendant company constructed and has since maintained and used a double-track wooden railroad bridge, with bascule draws, across Newark Bay. It is below Newark, between Elizabeth and Bayonne, and crosses the channel at an angle of about 66 degrees. Newark Bay is a navigable estuary, and its waters at this place are wholly within the State of New Jersey. The company proposes, and has commenced, to construct upon substantially the same location a substitute bridge of masonry and steel with four tracks and vertical draws. It claims that the acts of Congress of August 8, 1919, c. 42, 41 Stat. 277, and February 15, 1921, c. 47, 41 Stat. 1099, and the Bridge Act of March 23, 1906, c. 1130, 34 Stat. 84, with the approval of its plans by the Chief of Engineers and Secretary of War, confer authority to construct the bridge in question without the consent of the State. But the company also insists that, if the authority of the State is necessary, it was granted by the act of 1860.

Appellants maintain that the source of power to construct a bridge over navigable waters wholly within one State is in the State itself; that the concurrent consent of both state and federal governments is necessary before such a bridge lawfully may be erected; that the authority granted by the act of 1860 does not extend to the new bridge, and that under laws of New Jersey (c. 123, Laws of 1914, and c. 242, Laws of 1915) the approval of the

substitute bridge by the state Board of Commerce and Navigation is necessary.

The complaint alleges that the City of Newark owns real estate above the bridge on the westerly shore of the bay, and has expended large sums for improvements thereon, consisting of warehouses, slips, docks and other facilities of commerce, known collectively as Port Newark Terminal; that neither the present nor the proposed bridge is necessary to the operation of the railroad; that, because of the threatened construction of the proposed bridge, complainant has been unable to secure tenants for the terminal property; and that, if any bridge shall be constructed between Elizabeth and Bayonne, the free and unobstructed access of vessels to the Newark Terminal will be prevented and the value of the terminal destroyed. The complaint shows that the defendant the Port of New York Authority is a body corporate and politic, established by a compact between New Jersey and New York for the creation of the Port of New York District, and for the comprehensive development of that port. Congress gave its consent to the agreement. C. 151, Laws of New Jersey, 1921; c. 154, Laws of New York, 1921; c. 77, 42 Stat. 174. The district extends as far north as Irvington on the Hudson, New York, as far east as Long Beach, Long Island, as far south as Atlantic Highlands, and as far west as Summit, New Jersey, and so includes Newark Bay and the site of the bridge. See opinion of District Court in this case, 287 Fed. 196, 201. Pursuant to the compact, a comprehensive plan for the development of the Port of New York was approved by both States and consented to by Congress. C. 9, Laws of New Jersey, 1922; c. 43, Laws of New York, 1922; c. 277, 42 Stat. 822. Appellants insist that Congress, by creating and adopting as its instrumentality the Port Authority, qualified the license granted by the United States to the company by imposing as an additional requirement the approval of that body.

The petition of intervention of Jersey City adopts the allegations of the complaint and shows that within its territorial limits it has much shore land on Newark Bay and the Hackensack River, which is a continuation of the bay, and that it owns lands on these waterfronts, on which it has expended large sums for the construction of wharves and other improvements. The petition states that the construction of the proposed bridge will cause that city irreparable injury. The petition of intervention of the State of New Jersey calls attention to the provisions of the acts of 1914 and 1915, and alleges that the company has not obtained the approval of its plans for the proposed bridge by the Board of Commerce and Navigation.

The complainant and interveners pray judgment that the defendant company is without right or power to build the proposed bridge; that it would be an unlawful purpresture and public nuisance; and that its construction without the permission of the New Jersey Board of Commerce and Navigation and the Port Authority is unlawful, and for an injunction.

The defendant Port Authority answered. The defendant company moved to dismiss the complaint on the ground that it failed to state a cause of action. The motion was granted by the District Court (287 Fed. 196), and its decree was affirmed by the Circuit Court of Appeals. 297 Fed. 77. Complainant and interveners appealed to this court. Judicial Code, § 241.

By the legislation empowering the company to construct, maintain and use the railroad, the State of New Jersey consented to the construction of the bridge in question.

At the time the bridge was built, there was no applicable legislation by Congress. And it was within the power of the State to authorize its construction. *Willson* v. *Black-Bird Creek Marsh Company*, 2 Pet. 245, 252;

Escanaba Company v. *Chicago,* 107 U. S. 678, 683. Chapter 64, Laws of New Jersey, 1860, provides: "That it shall and may be lawful for the Central Railroad Company of New Jersey to extend their railroad from some point in their track in the city of Elizabeth, to some point or points on New York bay, in the county of Hudson, at or south of Jersey City; and for that purpose, in its construction and completion, maintenance, use and enjoyment, all and every provision of the act entitled, 'An act to incorporate the Somerville and Easton Railroad Company' [approved February 26, 1847], and of the several supplements thereto, shall extend and be applicable to the railroad now authorized to be constructed, in every respect as if the same had been originally authorized under the said act to which this is a supplement. [§1] . . . That the said railroad company shall construct a suitable bridge over any navigable water that they may cross, with a pivot draw with two openings, each of seventy-five feet in width, at right angles to the main channel, located at a point convenient for navigation . . ." (§2.) Section 6 of the act of incorporation of 1847 confers upon the president and directors of the company "all the rights and powers necessary and expedient to survey, lay out, and construct" the railroad "not exceeding one hundred feet in width, with as many sets of tracks and rails as they may deem necessary . . . and to erect embankments, bridges, ferries, and all other works necessary to lay rails and to do all other things which shall be suitable or necessary for the completion or repair of the said road or roads." These laws conferred on the company not only the powers expressly defined, but also those which fairly are incidental thereto. *Union Pacific Ry. Co.* v. *Chicago, &c. Ry. Co.,* 163 U. S. 564, 581. Necessary bridges are essential parts of the railroad; they are stretches of railroad over water. As to bridges over navigable waters, the act of 1860 specified draws and the num-

ber and width of openings. But it did not prescribe the number of tracks or other elements which were to constitute the railroad. The company was empowered to have as many tracks, within the width specified, as it deemed necessary. That the company in the first instance might have built a four-track bridge of permanent materials such as is now proposed, instead of the smaller wooden structure, cannot be doubted. The powers granted were not exhausted by the construction of the tracks and bridge first provided. Its charter was of unlimited duration. Bridges, as well as other elements of the property, must be replaced when they wear out or become inadequate. The company was empowered to maintain and improve its railroad, as it might from time to time find necessary or expedient. It was not bound to have its performance limited to the capacity of the bridge first constructed, but it was free to add to its transportation facilities by laying down additional tracks over waters crossed by its bridges as well as upon land. Plainly, authority to provide, as needed, better and stronger bridges having additional tracks is to be regarded as within the purposes of and incidental to the powers expressly given. See *Railway Companies* v. *Keokuk Bridge Co.*, 131 U. S. 371, 385, 389; *Brainard* v. *Clapp*, 10 Cush. (Mass.) 6, 10; *Western Union Telegraph Co.* v. *Polhemus*, 178 Fed. 904, 906. This case is not like *Morris and Essex Railroad Co.* v. *Central Railroad Co.*, 31 N. J. L. 205, or *McCran* v. *Erie Railroad Company*, 95 N. J. Eq. 653. In the former, the company, having laid out its railroad in accordance with the charter, was held to be without power to add a branch or spur. In the latter, it was held that a change of a part of the line shortening a curve could not be made without complying with § 16 of the Railroad Act of New Jersey, requiring the consent of the Riparian Commission (now the Board of Commerce and Navigation) and the payment of compensation to that body for land under water

taken by the company. Here no extension, branch, spur, or change of route is involved.

The replacement was authorized by the United States. The act of August 8, 1919 authorized the company to construct a bridge suitable to the interests of navigation, between Elizabeth and Bayonne, in accordance with the Bridge Act of March 23, 1906. The latter requires the plans and specifications to be approved by the Chief of Engineers and Secretary of War (§ 1), and provides that, whenever Congress shall authorize a bridge over navigable waters of the United States, the authority shall cease unless construction be commenced within one year and completed within three years. § 6. The company failed to commence construction within one year. But the act of February 15, 1921 made the time for commencing and completing the bridge two and five years respectively from the date of its passage. The Chief of Engineers and Secretary of War, December 29, 1922, approved the plans. The supremacy of the power of Congress to regulate commerce with foreign nations and among the States and of the regulations made by the exertion of that power is so well known as not to require citation of authority. Undoubtedly, that power extends to the navigable waters of Newark Bay and to the plans for the replacement of the bridge in question. As both state and federal governments have authorized or consented to the construction of the bridge, we need not decide whether the acts of Congress and approval of the plans by the Chief of Engineers and Secretary of War would be sufficient without the consent of the State, or whether, in respect of the navigable waters of Newark Bay wholly within the State of New Jersey, the legislation of Congress supersedes the laws of the State.

The laws of New Jersey do not require approval of the plans for the proposed bridge by the state Board of Commerce and Navigation.

Section 4, c. 123, Laws of 1914, provides: "All plans for the development of any water front upon any navigable water or stream of this State, or bounding thereon . . . in the nature of individual improvement or development, or as a part of a general plan which involves the construction, change, alteration or modification of a dock, wharf, pier, bulkhead, bridge, pipe line, cable, or any other similar or dissimilar water front development, to be undertaken subsequent to the passage of this act, shall first be submitted to the said commission [the Board of Commerce and Navigation. §§ 5, 13, c. 242, Laws of 1915], and no such development . . . shall be commenced or executed without the approval of this commission first had and received . . ." And it declares that any such development or improvement commenced or executed without such approval shall be deemed to be a purpresture and a public nuisance. The company in February, 1917, June, 1918, and February, 1922, applied to that board for the approval of its plans for the proposed bridge. All its applications were denied. Nevertheless, the company is free to insist that such approval was not required. See *Buck* v. *Kuykendall,* 267 U. S. 307. The plans for the new bridge to replace the old one are not shown by any allegations of fact to constitute a "plan for the development of any water front." The construction or replacement of a railroad bridge across a bay or river is not necessarily a "water front development." The company was empowered under the act of 1860 not only to construct and maintain its railroad and the existing double-track bridge across the bay, but also to replace that bridge by another having additional tracks, whenever the company found it expedient so to do. We find nothing in the act to indicate an intention to require the plans for such replacement to be submitted to the state board. It is plain that the construction to be undertaken by the company for the maintenance and betterment of its rail-

road bridge over the bay is not a "water front development to be undertaken subsequent to the passage" of c. 123, Laws of 1914.

Approval by the Port Authority of the company's plans for the proposed bridge was not required. There is no provision in any of the laws relating to the Port Authority, or to the comprehensive plan for the development of the port, which requires such approval. And the Port Authority does not claim that the company was required to obtain its permission. In its answer, it prays the court "to determine its legal duties in the premises," and expresses willingness to pass on the application for a permit if the court shall determine one is required. The complaint alleges that the bridge is not included in the comprehensive plan, and that the existing and proposed bridges "are in conflict therewith, obstructive thereof, and inimical thereto." But the fact that the bridge is not included does not make it unlawful, or leave the company without authority to construct it. It does not appear that the Port Authority has attempted, or has power, to deprive the company of its right to maintain, improve and use that part of its railroad. The assertion that the bridge is in conflict with the comprehensive plan is not supported by any facts alleged in the complaint or in the answer of the Port Authority. The pleader's naked assertion is not enough to support the contention that the consent of the Port Authority was required.

Decree affirmed.

CITY OF NEWARK, ET AL. *v.* CENTRAL RAILROAD COMPANY OF NEW JERSEY, ET AL.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 351. Argued November 21, 24, 1924.—Decided March 2, 1925.

1. New Jersey, by empowering a railroad company to have as many tracks within its specified right of way as it might deem necessary, and to erect suitable bridges to accommodate them, including draw bridges over navigable waters crossed, impliedly consented that, in the maintenance and improvement of the railroad, a draw bridge over Newark Bay, originally constructed with two tracks, might be replaced by a better one accommodating four tracks upon substantially the same location. Ls. N. J. 1860, c. 64. P. 381.
2. Both state and federal governments having consented to this replacement, it is unnecessary to decide whether the acts of Congress and approval of the plans by the Chief of Engineers and Secretary of War would be sufficient without the consent of the